	Original	Print
Proceedings in the United States Court of Appeals for the Ninth Circuit	85	85
Minute entry of argument and submission	85	85
Minute entry of order directing that opinion be filed etc	87	85
Opinion, Jertberg, J	88	85
Decree	102	98
Motion for clarification of remand	103	99
Petitioner's reply to respondent's motion for clarification of remand	107	101
Order denying motion	114	105
Order extending time to file petition for writ of certiorari	116	106
Order allowing certiorari	117	106

No. 17678

United States Court of Appeals

for the Ninth Circuit

SERVETTE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record

Petition to Review an Order of the National Labor Relations Board.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer to Complaint (G.C. 1-E) 12

Answer to Motion to Make More Definite and Certain (G.C. 1-G) 15

Answer to Petition to Review and Set Aside Its Order 47

Certificate of the National Labor Relations Board 42

Charges Against Labor Organization or Its Agents (G.C. 1-A) 3

Complaint and Notice of Hearing (G.C. 1-C) 7

Decision and Order 36

Exceptions to Intermediate Report of Trial Examiner 30

Intermediate Report and Recommended Order 18
- Conclusions of Law 29
- Findings of Fact 18

Motion to Make More Definite and Certain (G.C. 1-F) 13

Names and Addresses of Attorneys 1

Notice of Filing of Charge (G.C. 1-B) 5

Order Correcting Decision and Order 41

Order re Motion to Make More Definite and Certain (G.C. 1-H) 16

PAGE

Petition for Review of Decision and Order Dismissing Complaint by the National Labor Relations Board 44

Ruling on Motion to Make More Definite and Certain (G.C. 1-J) 16

Statement of Points Relied Upon, Petitioner's 50

Statement of Points Relied Upon, Respondent's 49

Transcript of Proceedings 51

Witness on Behalf of Respondent:

Finley, Jerry

—Direct 76

—Cross 79

Exhibits for General Counsel:

1-A—Charge Against Labor Organization or Its Agents 3

1-B—Notice of Filing of Charge 6

1-C—Complaint and Notice of Hearing 7

1-E—Answer to Complaint 12

1-F—Motion to Make More Definite and Certain 13

1-G—Answer to Motion to Make More Definite and Certain 15

1-H—Order 16

1-J—Ruling on Motion 16

1-L—Index and Description of Formal Documents 83

2 —Handbill 84

NAMES AND ADDRESSES OF ATTORNEYS

HILL, FARRER & BURRILL,
STANLEY E. TOBIN,

411 West 5th St.,
Los Angeles 13, California,

Attorneys for Petitioner.

MARCEL MALLET-PREVOST,
Assistant General Counsel,

National Labor Relations Board,
Washington 25, D.C.

Attorneys for Respondent.

GENERAL COUNSEL'S EXHIBIT NO. 1-A

Form NLRB-508

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

* * * * *

Case No. 21-CC-359. Date Filed: 3-10-60.

1. Labor Organization or its Agents Against Which Charge Is Brought:

Name 1. Wholesale Delivery Drivers & Salesmen's Local No. 848, 1616 West 9th Street, Room 223, Los Angeles, California—2. Central Labor Council of Los Angeles County, AFL-CIO, 108 West 7th Street, Los Angeles, California.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section (8b) subsection(s) (4)(A) and (4)(B) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

(i) Engaged in, induced and encouraged individuals employed by persons engaged in commerce and in industries affecting commerce to engage in a strike and

a refusal in the course of their employment to use, process, transport and otherwise handle and work on goods, articles, materials and commodities, and to perform services; and (ii) Threatened, coerced and restrained person and persons engaged in commerce and in industries affecting commerce; and, In both cases with objects thereof of forcing and requiring employers and self-employed persons to join a labor organization and to enter into agreements prohibited by Section 8(e); and for the further objects of forcing and requiring persons to cease using, selling, handling, transporting, or otherwise dealing in the products handled by and distributed by Servette, Inc., and to cease doing business with Servette, Inc., and to force and require Servette, Inc., to recognize and bargain with said Teamsters as the representative of its employees.

3. Name of Employer: Servette, Inc.

4. Location of Plant Involved: 2400 San Fernando Road, Los Angeles 65, California.

5. Type of Establishment: Distributor.

6. Identify Principal Product or Service: Specialty merchandise, as candy, liquor, etc.

7. No. of Workers Employed: 2 Warehousemen only.

8. Full Name of Party Filing Charge: Servette, Inc.

9. Address of Party Filing Charge: 2400 San Fernando Road, Los Angeles 65, California.

10. Tel. No.: CApitol 5-2263.

11. Declaration: I Declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

HILL, FARRER & BURRILL,
/s/ By CARL M. GOULD and
EDWIN H. FRANZEN,
/s/ By EDWIN H. FRANZEN,

Signature of Representative or person making charge.

Note: Kindly Send Copies of All Documents to Hill, Farrer & Burrill, 411 W. 5th St., Los Angeles 13, Cal. Attorneys for Servette, Inc.
Dated: March 10, 1960.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-B

Extension 892
March 10, 1960

Wholesale Delivery Drivers & Salesmen's
Local No. 848

1616 W. 9th St., Rm. 223
Los Angeles, Calif.

Central Labor Council of Los Angeles
County, AFL-CIO

108 W. 7th St.
Los Angeles, Calif.

Re: 1. Wholesale Delivery Drivers & Salesmen's Local No. 842 2. Central Labor Council of Los Angeles County, AFL-CIO (Servette, Inc.)

Case No. 21-CC-359

NOTICE OF FILING OF CHARGE

Gentlemen:

Pursuant to the provisions of the National Labor Relations Act, as amended, a charge alleging the commission of unfair labor practices within the meaning of the Act has been filed with this office. A copy of the charge is enclosed.

I would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position in respect to the allegations set forth in the charge.

The case has been assigned to Paul Cummings, Attorney whom you should contact if you have any questions or desire to discuss the case.

Very truly yours,

Ralph E. Kennedy
Regional Director.

Certificate of Service by Mail and Post office Return Receipt Attached.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-C

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CC-359

WHOLESALE DELIVERY DRIVERS & SALESMEN'S UNION, LOCAL NO. 848

and

SERVETTE, INC.

COMPLAINT AND NOTICE OF HEARING

It having been charged by Servette, Inc., herein called Servette, that Wholesale Delivery Drivers & Salesmen's Union, Local No. 848, herein called Respondent, has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8.

1. The charge was filed by Servette on March 10, 1960, and a copy was served on Respondent, by registered mail, on that date.

2. Servette, a California corporation, is engaged as a wholesale distributor of candy, holiday supplies and specialty merchandise, having its warehouse and prin-

cipal place of business at Los Angeles, California. During the past year in the operation of its said business, Servette purchased and received, at its Los Angeles warehouse, goods and commodities which were shipped to it directly by suppliers from outside the State of California, valued at in excess of $50,000.

3. Servette, Kory's Markets, Inc., McDaniels Markets and Daylight Markets are, and each of them is, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

5. Kory's Markets, Inc., McDaniels Markets and Daylight Markets, herein respectively called Kory, McDaniels and Daylight, are engaged in the operation of chain retail food supermarkets in the Los Angeles, California, metropolitan area. Kory, McDaniels and Daylight each, in the course and conduct of its said business, annually sells foodstuffs and commodities valued at in excess of $500,000, and annually purchases foodstuffs, supplies and commodities which are shipped to it in California by suppliers from outside the State of California, valued at in excess of $50,000.

The supermarkets operated by Kory, McDaniels and Daylight regularly and customarily purchase, handle, stock and sell the products distributed by Servette.

6. Since on or about February 1, 1960, the Respondent has been engaged in a labor dispute with Servette, and has struck and picketed Servette's wharehouse at Los Angeles, California.

7. Since on or about February 3, 1960, the Respondent has engaged in a campaign or program to enlist

the aid and cooperation of retail markets handling and stocking the products distributed by Servette in the Respondent's strike against Servette, and to promote a boycott by dealers and consumers of such products.

8. Pursuant to said program and campaign as set forth in paragraph 7 above and in furtherance of the Respondent's strike aforesaid, since on or about February 3, 1960, the Respondent has requested, solicited and appealed to individuals employed by Kory, McDaniels, Daylight and by other retail food markets in the Los Angeles metropolitan area to refuse to buy, sell, use, handle or work on the products sold and distributed by Servette, and to discontinue doing business with Servette and the route drivers delivering such products. As a consequence, store managers employed by such markets have refused to order, buy or accept delivery of such products.

9. Also pursuant to said program and campaign as set forth in paragraphs 7 and 8 above and in support of the Respondent's strike aforesaid, since on or about February 3, 1960, the Respondent has threatened, coerced and restrained Kory and other retail food markets by requesting and appealing to consumers, customers of Kory and other retail food markets in the Los Angeles metropolitan area, not to purchase from such markets certain name-brand products sold there, by means of handbills distributed by Respondent at the entrances to their retail establishments which falsely represented that such products, i.e., Good Season Salad Dressing and Old London Products, were distributed to the retail markets by Servette.

10. By the acts and conduct set forth in paragraphs 8 and 9 above, the Respondent has induced or encourage individuals employed by Kory, McDaniels, Daylight and by other persons engaged in commerce or in an industry affecting commerce to engage in strikes or refusals in the course of their employment to use, process, transport, or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and has threatened, coerced or restrained Kory and other persons engaged in commerce or in an industry affecting commerce.

11. An object of the acts and conduct of the Respondent as set forth in paragraphs 8 through 10 above was and is to force or require Kory, McDaniels, Daylight and other persons to cease using, selling, handling, transporting, or otherwise dealing in the products sold and distributed by Servette, and to cease doing business with Servette and route drivers delivering such products.

12. The acts and conduct of the Respondent set forth in paragraphs 8 through 11 above, occurring in connection with the operations of Servette and the operations of Kory, McDaniels and Daylight, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead, and do lead, to labor disputes burdening and obstructing commerce and the free flow of commerce.

13. The aforesaid acts of the Respondent set forth in paragraphs 8 through 12 above constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (i) and (ii) (B) and Section 2 (6) and (7) of the Act.

Please Take Notice that on the 8th day of August 1960, at 10:00 a.m., PDT, in Hearing Room No. 1, on the Mezzanine Floor, 849 South Broadway, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated At Los Angeles, California, this 5th day of July 1960.

/s/ RALPH E. KENNEDY,
Regional Director,
National Labor Relations Board,
Region 21,
849 South Broadway,
Los Angeles 14, California.

[Note: Affidavit of Service and Return Posted Receipts Attached (Ex. 1-D)].

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-E

[Title of Board and Cause.]

ANSWER TO COMPLAINT

Comes now Respondent and for Answer to the Complaint:

1. Admits the allegations in paragraphs 1 through 7 of the Complaint.

2. Denies the allegations contained in paragraphs 8, 10, 11, 12 and 13 of the Complaint.

3. Answering paragraph 9, admits that Respondent has from time to time distributed handbills to members of the public in the greater Los Angeles area requesting such members of the public not to purchase or consume certain products sold in retail stores, for the reason that Servette was one of the distributors of such products and had engaged in unfair labor practices in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act as more particularly set forth in the Complaint issued by the General Counsel of the Board in Case No. 21-CA-3869, presently awaiting decision by a Trial Examiner.

4. The distribution of handbills by Respondent, as alleged in paragraph 9 of the Complaint, was an expression and disemination of views, arguments and opinions and does not therefore constitute nor is it any evidence of an unfair labor practice under any of the provisions of the Act as provided in Section 8(c) thereof.

5. The distribution of handbills by Respondent, as alleged in paragraph 9 of the Complaint, was and is an

exercise of the rights of free speech and press guaranteed by the First Amendment to the United States Constitution and the Board is without constitutional power or authority to engage in any pre-publication restraint or censorship of such activities, whether based upon the alleged falsity of the leaflets, or otherwise.

Dated at Los Angeles, California, this 12th day of July, 1960.

/s/ CHARLES K. HACKLER,
Attorney for Respondent
1621 West Ninth Street,
Los Angeles 15, California.

Affidavit of Service by Mail Attached.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-F

[Title of Board and Cause.]

MOTION TO MAKE MORE DEFINITE AND CERTAIN

Comes now Respondent in the above matter and moves the Trial Examiner for an order requiring the General Counsel to make paragraph 9 of the Complaint herein more definite and certain in the following respects:

It is alleged in said paragraph that Respondent has "threatened, coerced and restrained Kory and other retail food markets by requesting and appealing to con-

sumers, customers of Kory and other retail food markets in the Los Angeles metropolitan area . . . by means of handbills . . . which falsely represented that such products . . . were distributed to the retail markets by Servette."

Respondent cannot determine from the underscored portions of paragraph 9 the names or locations of such "other retail food markets", to whose consumers and customers the Union allegedly addressed false leaflets. Respondent cannot adequately prepare its defense unless and until the Complaint is rendered more certain by stating the names of such markets and their locations and particularizing the manner, means, times and places constituting the allegedly false propagandizing on the part of the Union.

In this connection, counsel represents that the Union engaged in an extremely widespread appeal to the consuming public in the whole greater Los Angeles area through the use of leaflets in an effort to induce the public to refrain from buying or using products, the sale of which would enable Servette to continue to refuse to bargain in good faith with the Union. If such leafleteering is to be censored by the Board, it seems only fair that the specific area of censorship should be set out with particularity in the Complaint.

Wherefore, Respondent moves the Regional Director to forthwith transmit a copy of this Motion to the Associate Chief Trial Examiner of the Board for a ruling, sufficiently in advance of the hearing to afford Respondent a reasonable opportunity to prepare its defense to any amendment which the Associate Chief Trial Examiner may order made.

Dated at Los Angeles, California, this 12th day of July, 1960.

/s/ CHARLES K. HACKLER,
Attorney for Respondent,
1621 West Ninth Street,
Los Angeles 15, California.

Affidavit of Service by Mail Attached.
Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-G

[Title of Board and Cause.]

ANSWER OF COUNSEL FOR THE GENERAL COUNSEL TO RESPONDENT'S MOTION TO MAKE MORE DEFINITE AND CERTAIN

In response to Respondent's Motion, Counsel for the General Counsel hereby states that no evidence of unfair labor practices under paragraph 9 of the Complaint shall be proffered other than as to an employer named in said paragraph.

Dated at Los Angeles, California, this 20th day of July 1960.

/s/ PAUL D. CUMMINGS,
Counsel for the General Counsel,
National Labor Relations Board.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-H

[Title of Board and Cause.]

ORDER

Motion to Make More Definite and Certain having been filed with the undersigned on July 13, 1960.

It is hereby ordered that the same be, and it hereby is, referred to the Associate Chief Trial Examiner, National Labor Relations Board, for ruling.

Dated at Los Angeles, California, this 20th day of July 1960.

/s/ RALPH E. KENNEDY,
Regional Director,
National Labor Relations Board,
Twenty-First Region.

[Note: Affidavit of Service and Return Postal Receipts Attached (Ex. 1-I).]

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-J

[Title of Board and Cause.]

RULING ON MOTION

Counsel for the Respondent having moved for an order requiring the General Counsel to make paragraph 9 of the Complaint more definite and certain in some respects; Counsel for the General Counsel having an-

swered that no evidence as to unfair labor practices under this paragraph will be offered except as to threats, coercions and restraints designed to affect a business relation between Kory's Markets, Inc. and Servette, Inc. by means of requests and appeals contained in handbills directed to consumers and customers of Kory's Markets, Inc.; and it now appearing that paragraph 9 is more definite and certain, the motion is denied.

/s/ WALLACE E. ROYSTER,
Trial Examiner

Dated July 21, 1960.

[Note: Affidavit of Service by Mail Attached (Ex. 1-K).]

Admitted in Evidence August 8, 1960.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Case No. 21-CC-359

WHOLESALE DELIVERY DRIVERS & SALESMEN'S UNION, LOCAL NO. 848

and

SERVETTE, INC.

Paul D. Cummings, Esq., for the General Counsel.

Charles K. Hackler, Esq., of Los Angeles, Calif., for the Respondent.

Before: Wallace E. Royster, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This matter was tried before me in Los Angeles, California, on August 8, 1960. Upon a charge filed by Servette, Inc., herein Servette; the General Counsel of the National Labor Relations Board issued his complaint alleging that Wholesale Delivery Drivers & Salesmen's Union, Local No. 848, herein the Respondent, had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the National Labor Relations Act. as amended, 61 Stat. 136, 73 Stat. 519 herein the Act.

Upon the entire record in the case I make the following:

Findings of Fact

I. The business entities involved

Servette is a California corporation engaged in and near Los Angeles, California, in the distribution at wholesale of candy, holiday supplies and specialty merchandise. During the past year Servette purchased and received from points outside the State of California goods and commodities to a value exceeding $50,000.

Kory's Markets, Inc., McDaniels Markets and Daylight Markets, herein respectively Kory, McDaniels and Daylight, separately operate chain retail food supermarkets in the Los Angeles area. Each annually sells

foodstuffs and commodities valued at more than $500,000, and annually purchases foodstuffs supplies and commodities from suppliers located outside the State of California to a value in excess of $50,000. Kory, McDaniels and Daylight regularly and customarily purchase, handle, stock and sell products distributed by Servette.

II. The alleged unfair labor practices

The Respondent, concededly a labor organization within the meaning of Section 2(5) of the Act, since early February 1960[1] has been engaged in a labor dispute with Servette and has struck and picketed Servette's warehouse in Los Angeles.

In the period from February 3 through March 10, the Respondent, in aid and in support of its strike against Servette, sought to enlist the cooperation of retail markets stocking products distributed by Servette by encouraging such markets to cease doing business with Servette. The actions of the Respondent in this respect are alleged to constitute violations of the Act.

The testimony of Kenneth Kennish, manager for McDaniels in Maywood, California, is that within the period mentioned agents of the Respondent told him they had a dispute with Servette and asked him to cease dealing with Servette. The agents warned Kennish that if he failed to cooperate they would pass out handbills to customers. The handbills were in the form below:

[1] All the incidents involving the Respondent took place in 1960.

To the Patrons of This Store

Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.

* Brach's Candy
* Servette Candy
* Good Season Salad Dressing
* Old London Products

The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts.

These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of Servette appreciate your cooperation in this fight.

The handbills were passed out by Respondent's agents but Kennish continued his purchases from Servette.

Sam Gross, the manager of another McDaniels Market, testified that within the same period agents of Respondent asked him to remove merchandise distributed by Servette from his shelves. No threat to handbill customers was made on this occasion. At a meeting of McDaniels' managers, according to Gross, they were told by higher officials to use their best judgment in the matter and to do as they thought wise. Gross either diminished his purchases from or ceased doing business with Servette.

The testimony of Maurice Hattem, another McDaniels' manager, is that an agent of Respondent requested him not to handle Servette merchandise and showed him the handbill reproduced above, without saying that it would be distributed. Hattem diminished the amount of business that he gave to Servette or terminated it.

The testimony of Henry Tessler, a manager of a Daylight market, is that agents of the Respondent in the period mentioned told him of the dispute with Servette and asked him to cooperate by not handling Servette products. The agents said that they were passing out handbills to the customers of those markets who refused cooperation. The agents left the store and did not handbill.

The testimony of Pete Givigliano, manager of a Kory market, is that in late February agents of the Respondent told him of the dispute with Servette and showed the handbill, saying that they were going to pass these out to Kory customers unless Kory ceased doing business with Servette. The manager answered that he must get advice from the Kory central office. Some handbilling then was done by Respondent's agents to customers of that market. The next week the manager refused to permit Servette to stock the shelves and advised Servette that this action was taken because of the handbill. Agents of the Respondent on two subsequent occasions visited the market to assure themselves that Servette merchandise was not on display.

The testimony of Cecil Phillips, another Kory manager, is that in late February or early March two men passed out handbills in front of his store. It is a

reasonable inference, and I draw it, that the handbills were the same as that set forth earlier in this report. Phillips asked the men why they were handbilling. They left without asking him to stop handling Servette merchandise and he has not done so.

The testimony of Harley Salts, a Kory manager, is that on February 25, five men, identifying themselves as striking employees of Servette, told him of the dispute with Servette and asked him to remove Servette products from the shelves. Salts said that he would ask advice from his supervisor. The men passed out handbills that afternoon. The same five men on March 5 and March 12 passed out handbills to customers at the market. Salts did not stop dealing with Servette.

The testimony of Frank Franchino, a Kory manager, is that on March 8, agents of the Respondent passed out the described handbill to his customers. When he asked them to leave they replied that they would stop handbilling if he would quit handling Servette merchandise. Franchino continued to do business with Servette.

The testimony of Larry Drum, a Kory manager, is that agents of the Respondent passed out the described handbills to his customers within the time period indicated.

The testimony of the several market managers is undisputed; the Respondent does not deny that the described incidents took place; I credit the testimony summarized above.

Some of the markets mentioned buy Good Season Salad Dressing and Old London Products from a supplier other than Servette.

The first question for consideration is whether by these requests of the various managers the Respondent was inducing or encouraging any individual to strike or to refuse, in the course of his employment, to perform services for his employer with an object of forcing or requiring the markets to cease doing business with Servette. Decision turns upon the interpretation given the phrase "any individual" in the context of Section 8(b)(4)(i)(B) of the Act. This matter has been the subject of a number of intermediate reports by various trial examiners and of a U. S. District Court decision[2] by Judge Wyzanski in Massachusetts. The Board has not yet decided the point. I have considered this matter before (Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and Peyton Packing Company, Inc., case No. 33-CC-66, Intermediate Report issued May 23, 1960). I am of the opinion now as then that "any individual" does not include any of the market managers who were approached by Respondent's agents in this case. No wiser now than then, I adopt and set forth in the following paragraphs that portion of the earlier Report which deals with that question.

The section of the Act referred to appears in identical language in the bill known as S. 748 introduced by Senator Goldwater in late January, 1959, then sometimes referred to as the "Administration Bill." On the appearance of Secretary of Labor Mitchell before a Senate Subcommittee on February 4, Senator Kennedy asked the Secretary, "Would it be a violation of . . . your bill if the business agent of the Clothing Workers

[2]Alpert v. Excavating etc. Union, 46 LRRM 2319.

Union at company A spoke to the plant manager and requested him not to order materials—nonunion materials—from the racketeer plant in Pennsylvania?" Secretary Mitchell answered, "We don't think it would be, Senator." Senator Kennedy persisted, "Now supposing the plant in Pennsylvania was a nonunion plant, would it be a violation under your bill for union leaders in another company to go to his plant manager and ask him not to buy goods from the nonunion plant?" The Secretary replied, "Request him not to buy? No."

Following this appearance, Secretary Mitchell submitted answers to certain questions which had been raised in the course of his testimony in a letter to Senator Kennedy. In reference to the section of the Act of interest here, the Secretary wrote, "This is intended to reach secondary activity which is directed at a single employee and not primary activity. It is not intended to include any person acting as an agent of an employer, such as supervisory or managerial personnel." In the same communication the Secretary said, "a mere request of an employer or his agent would not be a violation of section [8(b)(4)(i)(B)] unless, under all the circumstances, it is found as a matter of fact that the request is accompanied by an express or implied threat of reprisal or force." Then speaking to a postulated case, the Secretary wrote "Although the superintendent is employed by the school board, it is assumed that he is a supervisor, in which case only the 'threat,' 'coercion,' and 'restraint' provision of the proposed section 8(b)(4)(ii), and not the 'inducement' or 'encouragement' provision of the proposed section 8(b)(4)-(i), is applicable to him, as it is the intent of the pro-

posed bill that only section 8(b)(4)(ii), and not section 8(b)(4)(i), is to apply to employers (in the generic sense) and to their agents, such as supervisors."

During the debate in the Senate on April 17, 1959, Senator Humphrey suggested that Section 8(b)(4)(i) posed a dilemma in that it appeared to forbid a labor organization to appeal to a supervisor to decline to accept a shipment from a struck employer. Senator Humphrey observed "to prohibit the union from approaching [supervisors] would be to cut off the union from its normal channels of communication. It would be a mockery to say that the union is free to persuade a neutral employer to assist it, but to deny the union access to the employer's supervisory and managerial staff." On April 21 following, Senator Goldwater, saying that he desired to allay some of the fears expressed by his colleagues, commented that 8(b)(4)(i) was intended to reach inducements directed at a single employee but made no mention of the supervisor problem.

On July 27, 1959, speaking of H. R. 8400 which contained the identical provision here for interpretation, Congressman Griffin commented that the law as it then existed did not provide a penalty against inducement and encouragement of farm laborers, railway workers and supervisors to engage in secondary boycotts. The amendment as finally adopted would, Congressman Griffin said, correct this situation by changing "employees" to "any individual employed by any person." On August 11, speaking in support of the change in Section 8(b)(4), Congressman Rhodes said, "Since farm laborers, railway labor, and supervisors are not 'employees' within the meaning of the Act, unions may

now without penalty induce them to engage in secondary boycotts. The Landrum-Griffin bill corrects this by changing the word 'employees' . . . to 'any individual employed by any person.'"

It is the obvious scheme of the Act, as recently amended, to permit a labor organization to seek by means of persuasion the cooperation of a secondary employer in aid of a primary labor dispute while forbidding the use of threats, restraints and coercion upon that employer to bring about the same result. It is also clear that a union may not use such persuasion directed to "any individual" in an employment relation with the secondary employer to induce or encourage "any individual" to strike or refuse to perform services in aid of a forbidden objective. As "any individual" excepting those who are sole proprietors or partners, is commonly employed by a "person," a literal reading of 8(b)(4)(i) would appear to forbid a union, by means of persuasion even though short of threats, coercion or restraint, to induce or encourage the president of a corporation to refuse to perform services for his corporate employer with an object of forcing or requiring the corporation to cease doing business with any other person. Such an interpretation of Section 8(b)(4)(i) would sharply limit the area in which (4)(ii) would find application. If a union may not ask the employee agent of a person whose business is in commerce to cease doing business with another person without violating the Act, then except as to sole proprietorships and partnerships, (4)(ii) is surplusage. Furthermore, a disparity would exist in that a union could use its arts of persuasion (always short of threats, coercion, or restraint) to the utmost

when dealing with a proprietor or a partner but be forbidden to use the same devices if the "person" exists in corporate form. Considering Section 8(b)(4) in its entirety and the practice by labor organizations, which according to legislative history, led to its adoption, I am convinced that a literal reading of 8(b)(4)(i) in the situation of this case would not accomplish the legislative objective. I believe that the interpretations given by Secretary Mitchell, Senator Humphrey, Congressman Griffin and Congressman Rhodes are not necessarily inconsistent. Viewing the section as a whole, the varying constructions may reasonably be explained in that they probably postulated different fact stiuations. Although not called upon here to decide, it seems not unlikely that a labor organization in an effort to persuade an employer to cease doing business with some other person might violate Section 8(b)(4)(i) if it was thus inducing or encouraging a managerial employee to refuse to perform services for his employer. The answer to this must be reached by considering whether the managerial individual is being induced or encouraged to do something against the interest of his employer rather than the contrary. Inducement or encouragement to bring about a strike of supervisory or management personnel is inimical to the secondary employer's interest and, given the forbidden objective, may well constitute a violation of Section 8(b)(4)(i), but that is not the factual setting of this controversy.

The managers of McDaniels Markets were authorized to decide as they best could whether to continue doing business with Servette in the face of threatened or actual handbilling. This, a policy decision, was one for them

to make. The evidence is persuasive that the same authority was vested in the managers of Kory. Some of them ignored the handbilling and continued to use Servette products. Others removed the Servette merchandise or diminished the volume of business done with Servette. None of these managers, I find, was in any respect refusing to perform services for his respective employer. Each, as he was empowered to do, decided what course of action would best solve the dilemma with which he was faced. Respondent's object under the facts here must have been to induce the various store managers to cease doing business with Servette by holding out the prospect that failure to do so would result in diminished trade. I do not understand how in reacting to this pressure the store managers were in any respect depriving their employers of their services in the slightest degree. In no genuine sense was the Respondent inducing or encouraging the managers as individuals to take any action. The inducement and encouragement was directed rather to the business entities. The varying reactions of the managers were reactions to the effect or possible effect of handbilling upon the businesses they managed. I find that no store manager was induced or encouraged to refuse in any manner to perform any services for his employer.

Because of the circumstance that not all of the markets purchased all of the four items listed in the handbill from Servette, it is contended by the General Counsel that the handbilling is to that extent and in that par-

ticular untruthful. It is the fact that all of the stores where the handbilling took place or where such action was threatened did business with Servette and purchased from the organization at least one of the items listed on the handbill. It is also the fact that all of the listed items were distributed by Servette. I find no misrepresentation to exist in the wording of the handbill.

Conclusions of Law

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act;

2. Servette, Kory, McDaniels and Daylight are persons within the meaning of Section 2(1) and Section 8(b)(4) of the Act and each is engaged in commerce within the meaning of Section 2(6) and 7 of the Act;

3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) or (ii) of the Act.

It is hereby recommended that the complaint be dismissed in its entirety.

Dated: November 9, 1960.

/s/ WALLACE E. ROYSTER,
Trial Examiner.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT OF TRIAL EXAMINER

Comes now Paul D. Cummings, Counsel for and on behalf of the General Counsel of the National Labor Relations Board, and pursuant to Section 102.46 of the Rules and Regulations of the Board, Series 8, respectfully files these his Exceptions to the Intermediate Report and Recommended Order of the Trial Examiner in the above-entitled matter, in the following particulars:

To the Findings of the Trial Examiner—

Page 2, Lines 4-9, Exception No. 1. That in the period from February 3 through March 10, the Respondent, in aid and in support of its strike against Servette, sought to enlist the cooperation of retail markets stocking products distributed by Servette by encouraging such markets to cease doing business with Servette. The actions of the Respondent in this respect are alleged to constitute violations of the Act.

Page 4, Lines 3-5, Exception No. 2. That "any individual" does not include any of the market managers who were approached by Respondent's agents in this case.

Page 5, Lines 49-53, Exception No. 3. That the managers of McDaniels Markets were authorized to decide as they best could whether to continue doing business with Servette in the fact of threatened or actual handbilling. This, a policy decision, was one for them to make. The evidence is persuasive that the same authority was vested in the managers of Kory.

Page 5, Lines 55-58, Exception No. 4. That none of these managers was in any respect refusing to perform services for his respective employer. Each, as he was empowered to do, decided what course of action would best solve the dilemma with which he was faced.

Page 6, Lines 1-3, Exception No. 5. That I do not understand how in reacting to this pressure the store managers were in any respect depriving their employers of their services in the slightest degree.

Page 6, Lines 3-4, Exception No. 6. That in no genuine sense was the Respondent inducing or encouraging the managers as individuals to take any action.

Page 6, Lines 4-5, Exception No. 7. That the inducement and encouragement was directed rather to the business entities.

Page 6, Lines 7-8, Exception No. 8. That I find that no store manager was induced or encouraged to refuse in any manner to perform any services for his employer.

Page 6, Lines 10-13, Exception No. 9. That because of the circumstance that not all of the markets purchased all of the four items listed in the handbill from Servette, it is contended by the General Counsel that the handbilling is to that extent and in that particular untruthful.

Page 6, Lines 17-18, Exception No. 10. That I find no misrepresentation to exist in the wording of the handbill.

To the Conclusions of Law of the Trial Examiner—

Page 6, Lines 29-30, Exception No. 11. That the Respondent has not engaged in unfair labor practices

within the meaning of Section 8(b)(4)(i) or (ii) of the Act.

To the Recommendation of the Trial Examiner—

Page 6, Lines 32-33, Exception No. 12. That it is hereby recommended that the complaint be dismissed in its entirety.

To the Failure of the Trial Examiner to Make the Following Findings—

Exception No. 13. That in the period from February 3 through March 10, Respondent, in aid and in support of its strike against Servette, sought to enlist the cooperation of managers of retail markets stocking products distributed by Servette by inducing and encouraging such managers to engage in a refusal in the course of their employment to handle products from Servette normally sold by the markets or to perform their usual services of buying Servette products and selling Servette products to their customers. The actions of the Respondent in this respect are alleged to constitute violations of the Act.

Exception No. 14. That the markets managed by Kenneth Kennish, Cecil Phillips, Harley Salts and Larry G. Drum buy Good Season Salad Dressing and Old London Products from Certified Grocers of Southern California and these same markets do not buy these products from Servette.

Exception No. 15. That the first question for consideration is whether by these requests to the various managers the Respondent was inducing or encouraging any individual to strike or to refuse in the course of his employment to use or otherwise handle Servette

products normally bought and sold by his employer or to perform the normal service of buying and selling Servette products to customers of his employer.

Exception No. 16. That the managers of McDaniels Markets were not authorized by their superiors to decide as best they could whether to continue doing business with Servette in the face of threatened or actual handbilling until the policy decision of what to do about the handbilling was made by their superiors, and passed on to them at a meeting of managers by higher officials of the Company.

Exception No. 17. That the evidence is persuasive that the authority to decide what to do in the face of threatened or actual handbilling rested with higher officials than the managers in the Kory Markets, rather than with the managers themselves.

Exception No. 18. That the Respondent induced and encouraged the managers of the markets to engage in a refusal in the course of their employment to handle the products of Servette sold in their markets and in a refusal to perform the service of selling Servette products.

Exception No. 19. That the Respondent's object under the facts here was to induce the various store managers to cease doing business with Servette by holding out the prospect that failure to do so would result in diminished trade.

Exception No. 20. That the Respondent induced and encouraged the managers as individuals to take action.

Exception No. 21. That the store managers were induced or encouraged to refuse to perform services and to handle products for their employers.

Exception No. 22. That because the handbill listed four items as coming from Servette and this handbill was distributed in front of stores where in fact only two of the items listed came from Servette, and the other two products came from Certified Grocers of Southern California, the handbill is to that extent, and in that particular, untruthful.

Exception No. 23. That misrepresentation exists in the wording of the handbill where said handbill was distributed in front of markets that sold products listed in the handbill as all coming from Servette when in fact at least half the named products came from an entirely different distributor, i.e., the Certified Grocers of Southern California.

Exception No. 24. That the five men who approached Harley Salts, a Kory manager, on February 25 and identified themselves as striking employees of Servette were acting as agents of the Respondent in furtherance of its program to enlist the aid of market managers in its dispute with Servette by telling Manager Salts of the Respondent's dispute with Servette in asking him to remove Servette products and in passing out handbills to Kory customers on February 25, March 5 and March 12.

Exception No. 25. That the Respondent, by inducing and encouraging the managers of the markets to engage in a refusal in the course of their employment to use or otherwise handle Servette products or to perform the service of buying and selling Servette products with an object of forcing or requiring the markets to cease using, selling, handling, transporting or otherwise dealing in the products of Servette or to cease

doing business with Servette, violated Section 8(b)(4)(i)(ii)(B) of the Act.

Exception No. 26. That the Respondent, by passing out false handbills threatened, coerced and restrained the markets with an object of forcing or requiring the markets to cease using, selling, handling, transporting or otherwise dealing in the products of Servette, and to cease doing business with Servette in violation of 8(b)(4)(ii)(B) of the Act.

Exception No. 27. That the Respondent violated Sections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B) of the Act.

To the Failure of the Trial Examiner to Recommend—

Exception No. 28. That the Respondent shall cease and desist distributing to the customers of Kory, McDaniels and Daylight Markets, or any person engaged in commerce or in an industry affecting commerce, handbills containing false information.

Exception No. 29. That the Respondent shall cease and desist inducing or encouraging any individual employed by Kory, McDaniels or Daylight Markets, or any person engaged in commerce or in an industry affecting commerce, to engage in a refusal in the course of his employment to use, handle products distributed by Servette, Inc., or to perform any services where an object thereof is forcing or requiring Kory, McDaniels or Daylight Markets, or any person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting or otherwise dealing in the products of Servette, Inc., or to cease doing business with Servette, Inc.

Exception No. 30. That the Respondent post and maintain appropriate notices.

Respectfully submitted,

/s/ PAUL D. CUMMINGS
Counsel for the General Counsel,
National Labor Relations Board.

Dated at Los Angeles, California,
this 30th day of November 1960.

United States of America
Before the National Labor Relations Board.

Case No. 21-CC-359

WHOLESALE DELIVERY DRIVERS & SALESMEN'S UNION, LOCAL NO. 848

and

SERVETTE, INC.

DECISION AND ORDER

On November 9, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent did not engage in any unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board[1] has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report attached hereto, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

We agree with the Trial Examiner's conclusion that the appeal to the various store managers doing business with Servette did not constitute a violation of Section 8(b)(4)(i)(B), since the record establishes that the store managers whom the Respondent sought to persuade not to do business with Servette were not "individuals" as that term is used in Section 8(b)(4)(i)-(B). We do so, however, only for the reasons set forth in the Carolina Lumber Company[2] and Minneapolis House Furnishing Company[3] cases. We therefore find it unnecessary to consider, and do not adopt, that portion of the Trial Examiner's opinion concerning the possible effect on a labor organization's liability under Section 8(b)(4)(i)(B) of its inducement or encourage-

---

[1]Pursuant to the provision of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

[2]Local 505, International Brotherhood of Teamsters, et al. (Carolina Lumber Company), 130 NLRB No. 148.

[3]Upholsterers Frame & Bedding Workers Twin City Local No. 61, etc. (Minneapolis House Furnishing Company), 132 NLRB No. 2.

ment of supervisory or management personnel to engage in a strike or other withholding of services.

We also agree, on the basis of our recent Lohman Sales Company[4] decision, that the Rsepondent's handbilling of the various stores doing business with Servette was protected by the publicity proviso to Section 8(b)(4).

Order

It is ordered that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. October 30, 1961.

(Seal)

BOYD LEEDOM, Member
JOHN H. FANNING, Member,
GERALD A. BROWN, Member,
National Labor Relations Board.

Philip Ray Rodgers, Member, Dissenting:

As I pointed out in my dissenting opinion in Lohman Sales, 132 NLRB No. 67, the proviso to Section 8(b)(4) does not protect handbilling of secondary employers in furtherance of a dispute with a distributor; the proviso contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette does not produce any products.

[4]International Brotherhood of Teamsters, Local 537 (Lohman Sales Company), 132 NLRB No. 67.

Accordingly, I would find the Respondent's threats to handbill, and its subsequent handbilling activities, constitute violations of Section 8(b)(4)(ii)(B) of the Act.

Moreover, were I to reach the question of the truth or falsity of the handbilling itself, I would find the handbilling to be unlawful, at least with respect to the Kory and McDaniels Markets, in that its purpose was not to truthfully advise the public.[5]

The facts disclose that in these instances the Respondent's handbills contained false information as to a material fact which, in my opinion, could only serve to mislead the public and result in injury to another neutral employer. In pertinent part, the handbills read:

---

[5]The second proviso in Section 8(b)(4) states:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. (Emphasis added.)

[The Respondent] urgently requests that you do not buy the following products distributed by Servette, Inc.

* Brach's Candy
* Servette Candy
* Good Season Salad Dressing
* Old London Products

Servette admittedly stocks and distributes all of these products. However, certain of the retail stores, namely McDaniel Market and one of the Kory Markets, purchased certain of these materials not from Servette but from Certified Grocers of Southern California. The latter concern is, like Servette, a distributor of grocery items; but Certified Grocers is, unlike Servette, a neutral employer not involved in the Respondent's dispute.

I cannot read the proviso in Section 8(b)(4) as a license for such inaccurate and misleading handbilling with respect to neutral employers.

October 30, 1961.

PHILIP RAY RODGERS,
Member,
National Labor Relations Board.

[Title of Board and Cause.]

ORDER CORRECTING DECISION AND ORDER

On October 30, 1961, the Board issued a Decision and Order[1] in the above-entitled proceeding in which an inadvertent error appeared.

It is hereby ordered that the aforesaid Decision and Order be, and it hereby is, corrected as follows:

1. By deleting footnote 1 in its entirety;

2. By changing footnotes 2, 3, 4, and 5 to read 1, 2, 3, and 4, respectively.

It is further ordered that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., November 2, 1961.

By direction of the Board:

HOWARD W. KLEEB,
Associate Executive Secretary.

---

[1] 133 NLRB No. 152.

United States Court of Appeals
For the Ninth Circuit

SERVETTE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board —Series 8, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 21-CC-359. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster, on August 8, 1960, together with all exhibits introduced in evidence at the hearing.

2. Copy of Intermediate Report and Recommended Order issued by Trial Examiner Wallace E. Royster on November 9, 1960.

3. Copy of General Counsel's exceptions to the Intermediate Report and Recommended Order received December 1, 1960.

4. Copy of Decision and Order issued by the National Labor Relations Board on October 30, 1961.

5. Copy of Board's Order correcting Decision and Order dated November 2, 1961.

In testimony whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 19th day of January, 1962.

[Seal]

/s/ OGDEN W. FIELDS,
Executive Secretary,
National Labor Relations Board.

[Endorsed]: No. 17678. United States Court of Appeals for the Ninth Circuit. Servette, Inc., Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition to Review an Order of the National Labor Relations Board.

Filed: January 23, 1962.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 17678

SERVETTE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW OF DECISION AND ORDER DISMISSING COMPLAINT BY THE NATIONAL LABOR RELATIONS BOARD.

To the Honorable, the Judges of the United States Court of Appeals, for the Ninth Circuit:

The National Labor Relations Board, in Case No. 21-CC-359 (Wholesale Delivery Drivers & Salesmen's Union, Local No. 848 and Servette, Inc.) after proceedings had before said Board in said matter dismissed the complaint therein (charging unfair labor practice) in its entirety on October 30, 1961.

I

Petitioner is engaged in business in the State of California within this judicial circuit where the alleged unfair labor practices set forth in the complaint occurred. Petitioner is a person aggrieved by the final order of the Board and the alleged unfair labor practices directly injured and were solely aimed at petitioner. This court, therefore, has jurisdiction of this petition by virtue of Section 10(f) of the National Labor Relations Act, as amended.

II

In support of this petition, the petitioner respectfully alleges:

1. Contrary to the respondent's findings of fact and conclusions of law as set forth in its Decision and Order, there is substantial evidence set forth in the record that the Wholesale Delivery Drivers and Salesmen Union, Local No. 848, engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(b) of the National Labor Relations Act, as amended.

2. The refusal of the respondent to find as conclusions of law in accordance with the Charge of the General Counsel of the National Labor Relations Board was in violation of the Act, contrary to law, without substantial evidence to support such action and against the evidence set forth in the record.

3. The respondent's Decision and Order dismissing the complaint in its entirety is contrary to the law, without substantial evidence and against the evidence set forth in the record.

4. The respondent's Decision and Order in dismissing the complaint in its entirety is contrary to the policy of the National Labor Relations Act, as amended.

5. The respondent's Decision and Order in dismissing the complaint in its entirety is an abuse of its administrative discretion.

III

The respondent was in error as to the findings of fact and conclusions of law in the following particulars:

In adopting the Intermediate Report of the Trial Examiner and in failing to adopt and approve the thirty enumerated exceptions to said Intermediate Report as set forth in the "Exceptions to Intermediate Report of Trial Examiner" filed with the Board on November 30, 1960 by the General Counsel of the National Labor Relations Board, a copy of which is attached hereto as Exhibit A and incorporated herein by reference.

Each and all the above findings of fact and conclusions of law made by the respondent in all the mentioned matters wherein the respondent failed to make proper findings and conclusions based upon the record, is and are prejudicial to respondent and constitute substantial error and respondent had no reasonable basis in the record for its specific findings and no justification for its failure to find as above stated.

IV

The respondent's Decision and Order in each and every mentioned specification has no reasonable basis in the record and violates petitioner's rights and privileges to petitioner's detriment.

Wherefore, the petitioner prays this Honorable Court:

1. That it cause Notice of this Petition to be served upon respondent;

2. That respondent's Decision, Findings and Order be, in each and all respects, annulled and set aside;

3. That this Court remand this matter to the Board with instructions to find and rule in accordance with the evidence set forth in the record and the exceptions set forth in this petition; and

4. That petitioner shall have such other and further relief as may be just and proper in the premises.

Dated: 13 December, 1961.

HILL, FARRER & BURRILL,
CARL M. GOULD,
/s/ By STANLEY E. TOBIN,
Attorneys for Petitioner,
Servette, Inc.

[Exhibit A—Copy of Exceptions to Intermediate Report.]

[Endorsed]; Filed Dec. 14, 1961. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW AND SET ASIDE ITS ORDER.

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151 et seq.), files this Answer to the petition to review and set aside its order issued October 30, 1961.

1. The Board admits the allegation of jurisdiction in Section I of the petition to review.

2. With respect to the allegations contained in the other sections of the petition to review, the Board prays

reference to the entire certified record for a full and exact statement of the proceedings before the Board, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law and order of the Board, and all other proceedings had in this matter.

3. The Board denies each and every allegation of error contained in the petition to review.

4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper.

5. Pursuant to Sections 10(e) and (f) of the Act, the Board is certifying and filing with this Court the entire certified record consisting of transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board.

6. Wherefore, the Board prays that the Court enter a decree denying the petition to review.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C. this 19th day of January, 1962.

[Endorsed]: Filed Jan. 23, 1962. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

RESPONDENT'S STATEMENT OF POINTS

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, respondent herein, and pursuant to Rule 17(6) of the rules of this Court, files this statement of points upon which it intends to rely.

I.

The Board properly concluded that none of the store managers are an "individual employed by any person" within the meaning of Section 8(b)(4)(i) of the National Labor Relations Act and that the Union's activities therefore did not violate Section 8(b)(4)(i)(B) of the National Labor Relations Act.

II.

The Board properly concluded that the Union's handbilling activities did not violate Section 8(b)(4)(ii)(B) of the National Labor Relations Act.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board

Dated at Washington, D. C. this 19th day of January, 1962.

[Endorsed]: Filed Jan. 23, 1962. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS RELIED UPON

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Servette, Inc., Petitioner herein, pursuant to the Rules of this Court, files this Statement of Points upon which it intends to rely in the above entitled proceeding.

1. The Respondent, the National Labor Relations Board, wrongfully failed to find that the Wholesale Delivery Drivers and Salesmen Union, Local No. 848, engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(3) of the Act.

2. The Respondent's Decision and Order in dismissing its complaint in its entirety is contrary to the law, without substantial evidence and against the evidence set forth in the record.

3. The Respondent's Decision and Order in dismissing the complaint in its entirety is contrary to the policy of the Act.

4. The Respondent's Decision and Order in dismissing the complaint in its entirety is an abuse of its administrative discretion.

HILL, FARRER & BURRILL and
CARL M. GOULD
/s/ By STANLEY E. TOBIN
Attorneys for Petitioner
Servette, Inc.

Dated at Los Angeles, California this 28th day of February, 1962.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 1, 1962. Frank H. Schmid, Clerk.

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CC-359

In the Matter of:

WHOLESALE DELIVERY DRIVERS & SALESMEN'S UNION, LOCAL NO. 848,

and

SERVETTE, INC.

TRANSCRIPT OF PROCEEDINGS

Hearing Room No. 1, 849 South Broadway, Los Angeles, California, Monday, August 8, 1960.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Wallace E. Royster, Esq., Trial Examiner.

Appearances: Paul D. Cummings, Esq., 849 South Broadway, Los Angeles, California, appearing on behalf of the National Labor Relations Board. Charles K. Hackler, Esq. 1621 West 9th Street, Los Angeles 15, California, appearing on behalf of Wholesale De-

livery Drivers & Salesmen's Union, Local No. 848, the Respondent. [1]*

* * * * *

Proceedings

Trial Examiner: On the record.

This is a formal hearing before National Labor Relations Board of Wholesale Delivery Drivers and Salesmen's Union, Local No. 848, Case No. 21-CC-359.

I am Wallace E. Royster, the Trial Examiner designated to make findings of fact, conclusions of law, and recommendations to the Board in respect to the issues.

Will you please state your appearances for the record?

Mr. Cummings: Paul D. Cummings, counsel for the General Counsel.

Mr. Hackler: Charles K. Hackler, counsel for the respondent union.

Trial Examiner: Your office address?

Mr. Hackler: 1621 West 9th Street, L.A. 15.

Trial Examiner: The reporter on my left makes the only transcript of these proceedings, which the Board will subsequently certify.

Proceed, Mr. Cummings.

Mr. Cummings: Thank you, sir.

I wish to have identified as a General Counsel's formal Exhibit 1-A to 1-L, the following documents. Exhibit 1-A, Original Charge, dated March 10, 1960.

---

*Page numbers appearing at top of page of Original Transcript of Record.

1-B, Affidavit of Service of 1-A, dated March 10, 1960.

1-C, Original Complaint and Notice of Hearing herein, [3] dated July 5, 1960.

1-D, Affidavit of Service of 1-C, dated July 5, 1960.

1-E, Answer of Respondent, dated July 12, 1960.

1-F, Motion to Make More Definite and Certain, dated July 12, 1960.

1-G, Answer of Counsel for the General Counsel to Respondent's Motion to Make More Definite and Certain, dated July 20, 1960.

1-H, Order referring Motion to Make More Definite and Certain to Associate Chief Trial Examiner for ruling, dated July 20, 1960.

Exhibit I, Affidavit of Service of 1-H, dated July 20, 1960.

1-J, Ruling on Motion [I [f]], dated July 21, 1960.

1-K, Affidavit of Service of 1-J, dated July 21, 1960.

1-L, Index and Description of Formal Documents.

I show these to the respondent's counsel.

Mr. Hackler: I saw them.

(Thereupon the documents above referred to were marked General Counsel's Nos. 1-A through 1-L, respectively for identification.)

Mr. Cummings: I now offer General Counsel's Exhibit 1-A through 1-L into evidence.

Mr. Hackler: No objection.

Trial Examiner: G. C. Exhibit 1-A through 1-L is received. [4]

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A through 1-L for identification, were received in evidence.)

Mr. Cummings: I wish at this time to request permission to make a motion to amend Paragraph 9 of the Complaint to change the wording in lines 4 and 5 from "Kory and other retail food markets," to "Kory, McDaniels and other retail food markets."

Trial Examiner: Is there objection?

Mr. Hackler: Mr. Trial Examiner, no, the answer to our motion for bill of particulars limited the matter to Kory, but counsel, in an off-the-record discussion, has reached agreement with me that he might add McDaniels Market, but with the understanding that the remainder of the other retail food markets—that there will be no evidence with respect to any so-called other retail markets.

Mr. Cummings: That is correct, sir.

Mr. Hackler: With that understanding I have no objection.

Trial Examiner: The Complaint is amended as moved.

Mr. Cummings: At the present time I wish to have identified as General Counsel's Exhibit No. 2 this paper which purports to be a handbill, and I offer this stipulation: It is stipulated that G. C. Exhibit No. 2, with the wording contained thereon, is the handbill and only handbill referred to in the Complaint and Respondent's Answer and also in the [5] evidence that is to follow.

Mr. Hackler: So Stipulated.

Trial Examiner: Very well. Noted.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Mr. Cummings: I move at this time that G. C. Exhibit No. 2 be received into evidence.

Trial Examiner: Hearing no objection, it is received.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received into evidence.)

Mr. Cummings: In an off-the-record discussion with counsel it has been agreed that I read into evidence certain affidavits from people who have been interviewed by the General Counsel's counsel and that the information contained therein will be stipulated to as being the statements that the people would have made had they been called and sworn in as witnesses.

Mr. Hackler: So stipulated. If they'd have been called and sworn as a witness they would testify substantially as you are about to read on both direct and cross-examination. So stipulated.

Trial Examiner: Very well.

Mr. Cummings: The first one is an affidavit obtained from Kenneth Harold Kennish. [6]

Mr. Hackler: Will you spell that, please?

Mr. Cummings: First name, K-e-n-n-e-t-h. Harold. Kennish, K-e-n-n-i-s-h.

It reads as follows:

"I, Kenneth Kennish, depose and say: I have been the manager of McDaniels Market No. 14 at 6135 Atlantic Boulevard in Maywood, California,

telephone Ludlow 7-3168, for 8 months. Some time the end of winter or early spring of 1960, 3 men came in the store. They introduced themselves as being from the Teamsters. I do not recall their names. They told me they had a labor dispute with Servette and asked me to cooperate with them by not dealing with Servette and by taking Servette merchandise off our shelves. They told me they would pass out handbills to my customers if I did not cooperate. They showed me the handbill. It asked the patrons of my store not to buy the following products delivered by Servette: Brach's Candy, Servette Candy, Good Season Salad Dressing and Old London products. I do not buy Good Season Salad Dressing and Old London products from Servette but from Certified Grocers of Southern California. The men passed out these handbills to my customers outside the store. They were standing right close to the door that leads from our parking lot. I kept doing business with Servette, Inc. I have read the above statement and I swear it is true." It is signed by Kenneth Harold Kennish. [7]

On the margin of this affidavit is also stated "Some men also came approximately a week later and handed out handbills to my customers."

Trial Examiner: What is the date of signature on that?

Mr. Cummings: This is subscribed and sworn to on July 26, 1960 at Los Angeles, California.

Mr. Hackler: So stipulated, counsel, and I might state that the men denominated in the affidavit of Mr.

Kennish as "3 union men" were each and all agents of the respondennt union and that the handbill which was exhibited to him is the handbill, a copy of which is in evidence as General Counsel's Exhibit 2.

Trial Examiner: Is it agreed between you also that in so far as any incident that may be mentioned in any of the affidavits that are to be read and as to the one that has been read, that these incidents took place within a period not exceeding 6 months before the filing of the charge?

Mr. Hackler: Yes.

Mr. Cummings: I will stipulate to that and also stipulate to the stipulation stated by Mr. Hackler just previously.

Trial Examiner: All right.

Mr. Hackler: In fact, referring to the Complaint. I would stipulate that they took place between February 3, 1960, and the date of the filing of the charge on March 10,—

Mr. Cummings: I will so stipulate. [8]

Trial Examiner: Very well.

Mr. Hackler: —which is a very limited period of time.

Mr. Cummings: The statement I am about to read has not been signed by Mr. Tessler, the man who just left, due to scruples as stated to me about signing documents.

Mr. Hackler: I will stipulate that if called and sworn as a witness he would go down the line on his unsworn statement.

Mr. Cummings: Thank you, sir.

Mr. Hackler: Although he might affirm it; I don't know.

Mr. Cummings: I might say that he did read the statement and he did assure me that it was true.

Mr. Hackler: I believe it to be true also.

Trial Examiner: All right. Go ahead.

Mr. Cummings: "I, Henry Tessler, depose and say: I am the manager of Daylight Market No. 3, 3800 West Santa Barbara, Los Angeles, California. I have been the manager of this store for about one year.

"I recall that in approximately the last part of February or the first part of March, 1960, 3 or 4 men came into the store. They said "Hello, Henry," and introduced themselves as being from the Teamsters. I recognized one or two of them as being drivers for Servette. They spoke to me about the labor dispute they had with Servette and asked me to cooperate with them by not handling Sevette products. They told me they were [9] passing out handbills to the customers of those markets that were not cooperating with them. I told them that I only handled one or two products distributed by Servette and that it would not do them any good to handbill my customers. I told them I did not want to get in the middle. They did not handbill. They left the store and I have not seen them since. I did not see the handbill. I have read the above statement and I swear it is true to the best of my knowledge and belief."

As I say, he did not sign it, but he affirmed it in my presence.

Mr. Hackler: So stipulated that if called and sworn as a witness he would so testify. It may be considered as if he had done so.

Trial Examiner: All right. Fine.

Mr. Cummings: The next one: "I am the manager at Kory's Market No. 6, 120 West Anaheim Boulevard, Wilmington, Spruce 51681.

"On approximately Thursday, 2/25/60, two representatives from the Teamsters No. 848 came into my store. They identified themselves as being from the union, giving me their cards.

"Jerry ....., one of them explained the labor situation at Servette, Inc. He's Business Agent for the Teamsters. He showed me a handbill and said we are going to pass these out to your customers. If you do not handle Servette, Inc., merchandise we won't hand them out. I said that I would have to [10] check with the main office about getting Servette merchandise out of the store.

They went out. Two passed out handbills in the parking lot and two at the front entrance to customers from 2:00 to 6:30 p.m.

The next week I refused to let the Servette driver stock the shelves. I told him to have Gaudio call. When Gaudio called I told him I wouldn't take an order because they would pass out leaflets if I got service from Servette.

The following week four men came in, two Servette drivers and two union men from 848. They were different men this time.

One of them said that 3 or 4 chains were cooperating with them on keeping Servette products out of their stores. If you will cooperate we will not pass out any handbills. They asked me 'Have you accepted any Servette merchandise?' I said

'No.' They could see the Servette racks were empty. The goods had all been sold and I had not allowed replacement.

They said 'We won't hit this store but Kory stores in the city are going to be hit real bad.'

They also told me that two or three Kory stores had refused Servette goods that same week. I called two stores. One was number 7 in the Valley and they told me they got serviced.

Jerry ....., 848 business representative came in [11] with Rob ..... the regular driver. It was a different Jerry than the first one. They appraoached me out front. They could see the racks still empty.

I do not recall the conversation but it pertained to the same situation regarding Servette."

I offer the stipulation that if Pete Givigliano were called he would so testify.

Mr. Hackler: So stipulated.

Mr. Cummings: I would also offer the stipulation that the Gaudio mentioned in this unsworn but adopted statement is the A supervisor at Servette.

Mr. Hackler: So stipulated.

Mr. Cummings: I also offer the stipulation that the words "hit hard" and "hit" in the affidavit refer only to the passing out of leaflets to customers of various markets.

Mr. Hackler: So stipulated. Now, what was the name of that witness?

Mr. Cummings: Givigliano.

Mr. Hackler: How do you spell that?

Mr. Cummings: G-i-v-i-g-l-i-a-n-o. Pete.

Mr. Hackler: Counsel?

Mr. Cummings: Yes, sir.

Mr. Hackler: From the affidavit, the statement, it appears that a week following the first visit that the witness called the man at Servette and told him about not taking new [12] orders. Then there was a further visit from the Union men. Do you have any information as to the timing of those two matters? Did the Union people appear after he had ceased dealing with Servette or before, or was it just as it is in the affidavit?

Mr. Cummings: It is my information that it is just as it appeared in the affidavit.

Mr. Hackler: It was at least some time after he had discontinued dealing with Servette that the Union people came back and in effect checked up then?

Mr. Cummings: Yes.

Mr. Hackler: All right. Thank you.

Mr. Cummings: The next is an affidavit: "I, Cecil B. Phillips, depose and say:

"I am the manager of Kory's Market No. 5 at 2250 Pico Boulevard, Los Angeles, California, DU 40570.

I have been the manager here for 3 years.

About the end of February or early March 1960, two men passed out handbills in front of my store. The handbill mentioned Brach's Candy. I asked them why they were handing out the handbills to my customers when we did not have any dispute with them. They went away. They did not ask me to stop handling Servette products. I still do business with Servette. At the

time of the handbilling we did not take Old London products or Good Season Salad Dressing from Servette [13] but from Certified Grocers.

I have read the above statement and I swear that it is true." C. B. Phillips, signature; "Subscribed and sworn to before me this date July 25, 1960, at Los Angeles, California."

Mr. Hackler: So stipulated. May it further be stipulated—the witness says that certain of the products named in the handbill that he did not have delivered by Servette, but can we have a stipulation that Brach's Candy he did receive from Servette? The inference is there. He excludes Servette products as not being received from Servette. So that we are clear, does that mean that Brach's Candy that he refers to—and it is also in the leaflet—that he did receive from Servette?

Mr. Cummings: I don't—quite frankly I don't know whether he received those other two or not, but since we can't say that he didn't receive those from Servette I think the effect would be the same.

Trial Examiner: You are left with whatever the affidavit says, then.

Mr. Hackler: All right. The affidavit is asylum, so we make whatever assumptions we want, I guess.

Mr. Cummings: I offer the stipulation that if Mr. Cecil B. Phillips were called he would have so testified.

Mr. Hackler: So stipulated.

Mr. Cummings: I also offer the stipulation that were [14] called he would have so testified.

Mr. Hackler: So stipulated.

Mr. Cummings: I also offer the stipulation that

were Mr. Cecil B. Phillips called he could identify General Counsel's Exhibit 2 as the leaflet passed out in front of his store.

Mr. Hackler: So stipulated.

Mr. Cummings: Now, the following that I am about to read is not a signed statement or an adopted statement, but a memorandum written by myself shortly within minutes after speaking to the manager named therein.

Mr. Hackler: May we be off the record a moment?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Cummings: If Sam Gross were called as a witness he would testify substantially as follows: That he is manager of McDaniels Market No. 18; that 3 Teamster representatives came in, including the former Servette driver, and asked him to take Servette merchandise off the shelves. He told them he would have to get permission. They made no threats or promises of any kind. They did not threaten him with handling. He would testify that at a meeting of managers of some kind they were told by company officials to try to get along with both sides and to do as they wished. When the Servette driver then employed by Servette next came in he was told by Gross to [15] let the order go this week unless Gross absolutely needed something.

The next statement, if Maurice Hattem, were called he would testify as follows: That he is manager of McDaniels Market No. 25; that he had one visit from a former driver at Servette and a representative of the

Teamsters Local 848. They requested him not to handle Servette products; told them, "I'll see what I can do." They showed him the handbill referred to as General Counsel's Exhibit No. 2, but they did not say that they would pass it out in front of his store. Hattem told the Servette man then currently employed by Servette "Unless I absolutely need it pass me up." He would also testify that he did not know if the Servette man left anything at that time or if he had been back.

This memo, because it is in substance a memorandum of a very brief conversation that took place between myself and Mr. Hattem, took place on March 16, 1960. I might add that I have been back, of course, to see Mr. Hattem, and several of the facts that I have incorporated in the statement Mr. Hattem would make if he were called were added at a subsequent meeting.

Mr. Hackler: That is still what he would testify to.

Mr. Cummings: That is in essence—as I made the statement that is what he would testify to.

Mr. Hackler: The essence is good enough.

Trial Examiner: That is agreeable to you, Mr. Hackler? [16]

Mr. Hackler: Yes, sir.

Trial Examiner: Very well.

Mr. Cummings: This next is an affidavit from Harley, H-a-r-l-e-y, Salts, S-a-l-t-s.

"I, Harley Salts, depose and say:

I am the manager of Kory's Market No. 1, 4710 South Broadway, Los Angeles, Adams 49854.

On approximately 2/25/60 about 2:00 p.m. 5 men who identified themselves as drivers for Ser-

vette, Inc., on strike came into the store and approached me in the front of the store. I was alone. I did not recognize any of them. They said they were members of Teamsters Local No. 848.

They asked me what I thought of their strike. They explained they were union men and the company was trying to put franchise drivers in and they were out of work as a result. They said 'Well you cooperate with us by taking Servette, Inc., merchandise off the shelves?' I said 'I will check with my supervisor.'

Two were doing the talking. They said 'We'll come back and check. We are going to pass out handbills. Is it all right.' He showed me the handbill. I said 'I would appreciate it if you wouldn't but I can't stop you as long as you do not give them out on company property.' They left and passed out handbills to my customers until approximately 5:00 p.m.

They came back Saturday 3/5/60 and again the following [17] Saturday 3/12/60 and passed out handbills from noon to approximately 5:00 p.m.

The handbill identified 'Old London Products' and 'Good Season Salad Dressing' which I do not buy from Servette but I buy them from Certified Grocers of California.

I did not stop dealing with Servette, Inc.

I have read the above statement and I swear that it is true." Signed Harley Salts.

This was "subscribed and sworn to before me," Paul Cummings, "this date, March 15, 1960, Los Angeles, California."

I offer the stipulation that if Mr. Salts were called he would so testify.

Mr. Hackler: So stipulated.

Mr. Cummings: I also offer the stipulation that the handbill referred to in this affidavit is General Counsel's Exhibit No. 2.

Mr. Hackler: So stipulated. May we also have a stipulation that where ever in testimony reference is made to Servette drivers, either alone or in company with Teamster representatives, talking to the managers, and asking them not to handle products, that the Servette drivers referred to there are striking Servette drivers?

Mr. Cummings: I will so stipulate.

Trial Examiner: Very well.

Mr. Hackler: It merges from that affidavit, but not [18] clearly from the others, and in the last two affidavits, however, the manager had occasion to talk to a different Servette driver, namely one who was still working, and had a conversation with him in each instance with respect to buying more products, and that would be a man-striking Servette driver.

Mr. Cummings: Fine. Thank you.

Mr. Hackler: I ask again with respect to this affidavit if you are able to stipulate that Kory's Market No. 1, of which Mr. Salts was the manager, did obtain Brach's Candy and Servette Candy from Servette?

Mr. Cummings: I will stipulate that he did.

Trial Examiner: All right.

Mr. Hackler: Thank you.

Mr. Cummings: Because I know that to be a fact.

The next is an affidavit from Frank Franchino, F-r-a-n-c-h-i-n-o.

"I, Frank Franchino depose and say:

I am the manager of Kory's Market No. 2, 5801 South Vermont, Los Angeles, PL 3-8380.

On approximately 3/8/60 two representatives from the Teamsters were passing out handbills to our customers concerning Servette, Inc., and its products at the rear customer entrance from 2:30 p.m. to 4:30. They passed out hundreds of handbills. I went out to them asked them to leave our property. [19] They moved to the sidewalk. One said 'I see you're the manager.' I had on my badge identifying me. He said 'We'll stop causing you trouble if you quit handling Servette merchandise.' I said that I'd have to look into it. I did nothing about it.

That is all that was said or done that I know of.

I have read the above statement and I swear that it is true. [Frank Franchino]"

Subscribed and sworn to on March 15, 1960.

There is a further memo, dated March 16, 1960, resulting from a telephone call that I had with Mr. Franchino, and it reads as follows:

"Frank Franchino, Kory's No. 2, told me today on the phone that all Kory's Markets including his own buy Good Season Salad Dressing also from Certified Grocers of California."

This "also" I have circled here, this being my own notation. I will stipulate that he made this statement to me at the time. I think the other affidavits made clear that certain Kory's Markets do, in fact, not by Good Season Salad Dressing and Old London Prod-

ucts from Servette as well as from Certified Grocers. Agreed, sir?

Mr. Hackler: Let me see if I understand the stipulation. Touching upon all the Kory's Markets' locations of incidents do I understand that some, but not all of them, obtain Good Season Salad Dressing and Old London Products from Servette [20] and some, but not all of them, obtain those two products from Certified Grocers, another distributor?

Mr. Cummings: Would you read that back please?

(Record read.)

Mr. Hackler: Basically it is some do and some don't.

Mr. Cummings: I will stipulate to that.

Trial Examiner: All right.

Mr. Hackler: Now, counsel, may it be stipulated that as to Servette Candy named in the leaflet and Brach's Candy, that all of the Kory outlets obtain those products, to some degree at least, through delivery by Servette? I might suggest that your affidavits exclude the other products in the context that indicates that the two main ones, that is Brach's Candy and Servette Candy, are received from the concern that the Union had the dispute with.

Mr. Cummings: Yes. That is true, and that was the understanding that I had with the market managers at the time they made the statements to me. I will stipulate to that, yes, sir.

Mr. Hackler: So stipulated.

Trial Examiner: All right.

Mr. Cummings: I offer the stipulation that—

Mr. Hackler: May I just interrupt just one moment?

Mr. Cummings: Yes, Surely.

Mr. Hackler: The same, I take it, is true of the McDaniels Market with respect to Brach's Candy and Servette [21] Candy being received by the McDaniels Market involved by Servette delivery. I think it must be true because Paragraph 9 of the Complaint, touching upon the falsity of the leaflets, refers to them as being false only to the extent of Good Season Salad Dressing and Old London Products, and not the other two.

Mr. Cummings: Yes. I don't think the Complaint goes any further than the products you have just mentioned.

Mr. Hackler: I assume it would go farther, if, in fact, the other two products named were received from some other source.

Mr. Cummings: You are correct in that assumption sir. We will go only on the two products, Old London and Good Season Salad Dressing.

Trial Examiner: All right.

Mr. Hackler: So stipulated.

Mr. Cummings: Off the record, sir?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Cummings: I offer the stipulation that if Larry G. Drum, manager of Kory's Market No. 3 at 500 West Florence, Los Angeles, California, were called, he would testify as follows: That he is the manager of Kory's Market No. 3 above mentioned, and that his store buys Old London Products, [22] and Good Season Salad Dressing through Certified Grocers of

Southern California, and that Teamster agents from Local 848 passed out handbills of the type identified in General Counsel's Exhibit No. 2.

Mr. Hackler: I take it that period there would be between the date of the charge and—

Mr. Cummings: Yes. The time element—

Mr. Hackler: —and some date undisclosed.

Mr. Cummings: Are we in agreement that—I think we are in agreement that this handling is all part of the plan and we have previously identified the time.

Mr. Hackler: All right. So stipulated.

Trial Examiner: All right.

Mr. Cummings: I will also add the stipulation that Brach's Candy and Servette Candy, if sold in this particular market,—

Trial Examiner: Came from Servette?

Mr. Cummings: Came from Servette.

Mr. Hackler: So stipulated.

Trial Examiner: O.K.

Mr. Cummings: There is another further stipulation that I would like to add at this time, Mr. Hackler, and that is that all the markets we have identified so far have done, and do do, and were doing at the time we are concerned within this hearing, business with Servette. [23]

Mr. Hackler: Well, the doing of business—that is being factual about it—with the purchasing of Brach's Candy and Servette Candy and in some, but not all instances, the other two products; isn't that what you mean?

Mr. Cummings: Fine. Right. It is limited to that, yes.

Mr. Hackler: I don't like the conclusion "doing business." It might be in the real estate business.

Mr. Cummings: I would like to ask for a short recess to examine my position at this time.

Trial Examiner: All right.

Mr. Hackler: Do you have the information as to the number of markets overall in the Kory chain and we will say in the McDaniel chain and the Daylight Market chain?

Mr. Cummings: No, sir; I have no idea as to the number of markets there are.

Mr. Hackler: May we have a stipulation that each of those 3 concerns which are referred in Paragraph 3 of the Complaint—that is Kory's Markets, Inc.; McDaniels; and Daylight Markets, are retail food market chains operating a substantial number of separate retail chain markets in the greater Los Angeles area.

Mr. Cummings: I will stipulate to that, yes, sir.

Trial Examiner: All right.

Mr. Cummings: I offer the further stipulation that the individual markets that have been identified so far are [24] markets and outlets in the 3 chains mentioned in the Complaint, namely Kory's, McDaniels, and Daylight.

Mr. Hackler: So stipulated. Those are some of the outlets.

Mr. Cummings: Yes, sir. I so stipulate.

Trial Examiner: All right. Now you want a short recess?

Mr. Cummings: I do, sir.

Trial Examiner: All right. We will take one.

(Short recess.)

Trial Examiner: On the record.

Mr. Hackler: It may be stipulated with counsel that where ever, in the course of the stipulated testimony, market managers said that they were dealing with agents of Teamsters' union, that in each and every instance such agents were, in fact, agents of the respondent Teamsters' local union, excluding, however, the instances where the market manager identified some of the people talking to him as being Servette drivers. In each instance where Servette drivers were referred to those persons were not officials or agents of the Union, but members of the Union and on strike as a part of the Union's labor dispute with Servette.

Mr. Cummings: Well, that is a factual conclusion, actually, when we mention—we have agents in 2 aspects; one, the agents as employed by the Teamsters as agents; and the other is the legal conclusion that might be drawn from [25] striking drivers participating in a program fostered by the Teamsters in their conducting of the matter concerned with Servette.

Mr. Hackler: I don't think it makes too much difference, counsel, where Teamster agents are carrying on a conversation with management and 2 or 3 strikers along with them. I simply don't care to stipulate that people on strike are necessarily agents of the Union.

Mr. Cummings: Well, in that case, can we stipulate that the agents—Teamster representatives referred to in the various statements and the affidavits I have read, are agents of Local 848?

Mr. Hackerl: Oh, yes. The agents are agents. There is no question about that.

Mr. Cummings: Well, I will so stipulate.

Trial Examiner: All right.

Mr. Cummings: Now, as to the accompanying drivers.

Mr. Hackler: Let's be clear on one thing. You have got one instance here where 5 strikers hand out leaflets in front of the store and the manager comes out and accosts them and engages them in a conversation. I am not prepared to state that the Union, as a union, is responsible for what those strikers may or may not have said. I don't think we have to reach to the guts of your complaint here, where, as a matter of principle, I am certainly not going to say it because [26] strikers have a way of sometimes carrying the ball in their own fashion.

Trial Examiner: Anyway, you don't make that confession?

Mr. Hackler: No.

Trial Examiner: All right.

Mr. Hackler: I would *also to* stipulate that Paragraph 7 of the Complaint indicates that there was a labor dispute and a strike against Servette, and that has been admitted. I would like to more particularize that by inviting official notice to the proceedings in the case of Servette, Inc., in case No. 21-CA-3869, which complaint has been issued in, and which is awaiting and intermediate report from Trial Examiner Doyle, as background material and showing what the dispute what was over, and it is also affording some explanation of the strikers, where they came from, and when they struck, and that sort of thing.

Mr. Cummings: I will stipulate that there is such a proceeding currently before the Division of Trial Examiners.

Mr. Hackler: I am merely offering it for whatever background value it may have. It may turn out that the Trial Examiner and the Board will feel that it has no background value.

Trial Examiner: I am not going to go through the file in the previous Servette case unless I am told in what respects [27] I should examine it. I suppose that I can take notice of the Complaint, as issued, making certain allegations.

Mr. Hackler: That is as far as I wish to go.

Trial Examiner: Do you object to that?

Mr. Cummings: I have no objection to that.

Trial Examiner: All right.

Mr. Hackler: From my standpoint, very simply, I simply want the record to show that these people are protesting unfair labor practices for what it is worth. At least they are being prosecuted that way. Ultimately whether the case is won or not I suppose remains to be seen. I don't expect the Trial Examiner to go into a lot of details about it.

Trial Examiner: All right.

Mr. Cummings: On the stipulation, just so we understand one another, I offer this stipulation: That the people referred to in the various statements and affidavits that have been previously read into the record that referred to Teamster representatives, that these Teamster representatives are agents of Local 848.

Mr. Hackler: So stipulated. It has already been so stipulated.

Mr. Cummings: I just wanted to make sure we understood one another.

Trial Examiner: All right.

Mr. Cummings: I also want it clear at this time that I [28] make no admissions with regard to the so-called striking Servette drivers in their relationship to the Union.

Mr. Hackler: That is so understood.

Trial Examiner: All right.

Mr. Hackler: I might point out, counsel, that Paragraph 7 of the Complaint has been admitted in the Answer. We admit that we have engaged in a campaign or program to enlist the aid and cooperation of retail markets handling and stocking the products distributed by Servette in the Respondent's strike against Servette, and to promote a boycott by dealers and consumers of such products. That is all admitted. It seems to me it isn't a too highly significant matter in the case.

Mr. Cummings: Further, I offer the stipulation that the requesting by the Teamster representatives of Local 848, together with the striking drivers from Servette, requesting the various market managers above mentioned not to handle Servette products, together with the actual handing out of the handbills by Local 848 agents and former Servette drivers now on strike, was in furtherance of the campaign or program set forth in Paragraph 7 of the Complaint.

Mr. Hackler: Well, I think the evidence speaks for itself in that regard. I don't like these conclusionary stipulations.

Trial Examiner: All right.

Mr. Hackler: You have the evidence of what was said and [29] what was done.

Trial Examiner: Of course you admit in your Answer, if I recall it correctly, that you did leaflet in support of such a program.

Mr. Hackler: Yes, and that we had such a program. Whether the particular instances here would be deemed in furtherance of that particular program or otherwise, I think the facts will speak for themselves.

Mr. Cummings: May we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Cummings: The General Counsel rests.

Mr. Hackler: I have just one witness.

Jerry, will you take the stand?

JERRY FINLEY,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Hackler): State your name, please.

A. Jerry Finley, F-i-n-l-e-y.

Q. What is your occupation?

A. I am a Business Agent for the Teamsters' Union Local 848.

Q. I take it you were active, Mr. Finley, in this program involving the dispute with the Servette Company? [30]

A. Yes, sir, I was.

Q. This leaflet, which is G. C. Exhibit 2, I will ask you if that is the only leaflet that was used by the Union in that program?

A. Yes, sir, it was.

(Testimony of Jerry Finley.)

Q. And could you approximate the number of retail chain supermarkets at which this leaflet was distributed during the course of the program?

A. It would be well over 50.

Q. In the greater Los Angeles area?

A. Yes, sir.

Q. And would it be fair to say that the evidence here with respect to McDaniels and Kory's and Daylight were only 3 of the chains at which leafleteering took place? A. Yes, sir.

Q. And did you engage in some of the leafleteering yourself, the physical handing out of the leaflets?

A. Yes, sir, I did.

Q. And were you in general charge of others who were engaged in the same program?

A. Yes, sir, I was.

Q. And uniformally were the leaflets distributed at the customer entrances of the stores?

A. Yes, sir, in all instances.

Q. Now, in addition to the retail supermarkets, was the same [31] leaflet distributed anywhere else in connection with this dispute with Servette?

A. Yes, sir. We distributed these leaflets at Union meetings.

Q. Of about how many unions?

A. Well, over 30 unions, I would say offhand.

Q. Union meetings. You mean meetings of local union members?

A. Yes, sir, and also at District Council meetings such as Carpenters District Council and Joint Council Teamsters meetings.

(Testimony of Jerry Finley.)

Q. Do you know if a facsimile of the leaflet was published in any of the Teamster publications?

A. Yes, sir, it was. [32]

Q. And what publication was that?

A. That was the Teamster—that is the weekly Teamster paper.

Q. That is the Southern California Teamster?

A. Yes, sir.

Q. And that is a publication that is published weekly by the Teamsters' Union in Southern California?

A. Yes, sir, and also, I believe, that it was also published in the U. A. W. Long Beach paper, and also in the Machinists' Lodge out of Santa Monica paper.

Q. Now, did it ever come to your attention during the course of this leafleteering that any drivers or other people refused to make deliveries at the place that was being picketed?

A. No, sir. Never.

Q. Was there ever any contention made to you by any person, either from the stores or the Government or anywhere else, that anybody had ceased working as a result of this program?

A. No, sir. In fact, if any of our drivers would see us passing out leaflets we would certainly tell them to go through and, you know, to certainly deliver to the store.

Q. Was that a part of your instructions to the people? A. Yes, sir.

Q. Is that the way you conducted the picketing?

A. Yes, sir.

(Testimony of Jerry Finley.)

Q. The leafleteering, I should say. [33]

A. Leafleteering.

Mr. Hackler: May I stipulate, Counsel, that the Government has no evidence to offer and makes no contention—let's put it that way—that makes no contention that an effect of this leafleteering program was the inducing of any individual employed by any person other than Servette in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

Mr. Cummings: No, sir. I think the facts are the contrary.

Mr. Hackler: The facts you have in evidence?

Mr. Cummings: Yes, sir.

Mr. Hackler: Well, let's put it more simply. There is no contention on your part that truck drivers, for example, seeing the leafleteering, refrained from making their general deliveries to any of these places?

Mr. Cummings: No, sir, we have no evidence to this effect.

Mr. Hackler: No contention that any truck driver refused to pick up or transport goods at any of these establishments?

Mr. Cummings: That is true.

Mr. Hackler: I think that is all.

Trial Examiner: Any questions? [34]

Cross-Examination

Q. (By Mr. Cummings): Mr. Finley, did you pass out leaflets at any of the particular markets mentioned in the evidence so far?

(Testimony of Jerry Finley.)

A. Yes, sir. I am sure I must have. I passed them out all over. I believe I hit one Kory's on Florence and Vermont there. That one. Not Florence and Vermont. I think it would be—anyway, that one on Florence that was named wherever this fellow who was the manager, named there. Just in this slight—just a slight bit that you had on memorandum.

Q. Did you pass them out at the mentioned Wilmington Kory Market?

A. No, sir. I myself did never—I never did pass out a leaflet at Wilmington Kory Market.

Q. Did you contact the manager at that store?

A. Yes, sir, I did.

Q. Mr. Pete Givigliano?

A. Yes, sir, I did.

Q. Was this in furtherance of the campaign to enlist the support of the various markets?

A. Yes, sir, it was.

Q. In your labor dispute with Servette?

A. Yes, sir.

Mr. Cummings: May we go off the record for a moment? [35]

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Cummings): Mr. Finley, in the affidavit of Mr. Kenneth Kennish, which has been read into the record by me, he states that the leafleteering took place at his market, which is a McDaniels Market, No. 14, at 6135 Atlantic Boulevard in Maywood, California. Did you pass out leaflets at that market?

A. Yes, sir. Yes, sir, I did.

(Testimony of Jerry Finley.)

Q. And was this also in furtherance of the Local 848's campaign to enlist the markets in support of their strike—

A. Yes, sir.

Q. —in labor dispute with Servette, Inc.?

A. Yes, sir, it was.

Q. Mr. Finley, how many market managers cooperated with you by taking their goods off the shelves?

Mr. Hackler: This is objected to as immaterial.

Trial Examiner: I will overrule the objection.

You may answer.

The Witness: There's actually—unless you go back and check, it is pretty doggone difficult to tell, Paul. Some of them would say that—cooperate, and you'd never know unless you went back and checked.

Now, the only one I do know that—for sure that did [36] would be Kory's down in Wilmington for a short period of time. This is the only one I know of absolutely that did.

Q. (By Mr. Cummings): This is Pete Givigliano's market?

A. Yes, that's correct.

Mr. Cummings: I have no further questions.

Mr. Hackler: No further questions.

Trial Examiner: That is all, Mr. Finley.

(Witness excused.)

Trial Examiner: Anything else, Mr. Hackler?

Mr. Hackler: Nothing further. We rest.

Trial Examiner: No brief?

You, Mr. Cummings?

(Testimony of Jerry Finley.)

Mr. Cummings: Yes, sir, I will file a brief, yes, sir.

Mr. Hackler: I will file one, too.

Trial Examiner: How much time do you want?

Mr. Cummings: Whenever you say, sir.

Trial Examiner: Is three weeks enough for you?

Mr. Hackler: The maximum, if it suits you. That is the maximum, I guess.

Trial Examiner: No. Thirty-five days is the maximum.

Mr. Hackler: Whatever you say, Mr. Cummings.

Trial Examiner: Today is the 8th. Well, send me a Twenty Six Fed. Servette 37745
brief, if you intend to do so, on or about August 29, at Room 206, 630 Sansome Street, San Francisco 11.

Mr. Hackler: To be received by you on the 29th? [37]

Trial Examiner: Yes.

There being nothing further, the hearing is closed.

(Whereupon, at 11:50 o'clock A.M., Monday, August 8, 1960, the hearing in the above-entitled matter was closed.) [38]

[Endorsed]: Filed August 11, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 1-L

INDEX
AND
DESCRIPTION OF FORMAL DOCUMENTS

Exhibit 1 (a) Original Charge, dated March 10, 1960.

Exhibit 1 (b) Affidavit of Service of 1(a), dated March 10, 1960.

Exhibit 1 (c) Original Complaint and Notice of Hearing herein, dated July 5, 1960.

Exhibit 1 (d) Affidavit of Service of 1(c), dated July 5, 1960.

Exhibit 1 (e) Answer of Respondent, dated July 12, 1960.

Exhibit 1 (f) Motion to Make More Definite and Certain, dated July 12, 1960.

Exhibit 1 (g) Answer of Counsel for the General Counsel to Respondent's Motion to Make More Definite and Certain, dated July 20, 1960.

Exhibit 1 (h) Order referring Motion to Make More Definite and Certain to Associate Chief Trial Examiner for ruling, dated July 20, 1960.

Exhibit 1 (i) Affidavit of Service of 1(h), dated July 20, 1960.

Exhibit 1 (j) Ruling on Motion (1(f)), dated July 21, 1960.

Exhibit 1 (k) Affidavit of Service of 1(j), dated July 21, 1960.

Exhibit 1 (l) Index and Description of Formal Documents.

Admitted in Evidence August 8, 1960.

GENERAL COUNSEL'S EXHIBIT NO. 2

To the Patrons of This Store

Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.:

* Brach's Candy
* Servette Candy
* Good Season Salad Dressing
* Old London Products

The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts.

These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of Servette appreciate your cooperation in this fight.

Admitted in Evidence August 8, 1960.

85–86 In the United States Court of Appeals for the Ninth Circuit

Before: CHAMBERS, JERTBERG, Circuit Judges and CLARK, District Judge

Minute Entry of Argument and Submission—July 12, 1962

This cause coming on regularly for hearing or submission, Mr. Stanley Tobin, argued for the appellant, and Mr. Norton Come, Attorney for the National Labor Relations Board, argued for the appellee, and thereupon the Court ordered the cause submitted for consideration and decision.

87 In United States Court of Appeals for the Ninth Circuit

Before: CHAMBERS, JERTBERG, Circuit Judges and CLARK, District Judge

Minute Entry of Order Directing That Opinion Be Filed, etc.—November 26, 1962

ORDERED, That the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

88 In United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Opinion, November 26, 1962

Before: CHAMBERS and JERTBERG, Circuit Judges, and CLARK, District Judge.

JERTBERG, *Circuit Judge:* This case is before the court upon the petition of Servette, Inc. to review a decision and order of

the National Labor Relations Board dismissing an unfair labor practice complaint which had issued upon charges filed by petitioner. The Board's decision is reported at 133 NLRB p. 1501 (Oct. 30, 1961).

The case involves an attempt by the Wholesale Delivery Drivers and Salesmen's Union, Local No. 848, to force several retail markets to cease doing business with petitioner with whom the Union was having a labor dispute. It was charged that the Union activity was proscribed by § 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended 29 U.S.C. § 158(b)(4)(i)(ii)(B).[1]

89 The primary facts are not in dispute. Petitioner is a wholesale distributor of specialty merchandise such as candy, liquor, holiday supplies and specialty articles in the area of Los Angeles, California. Included in such merchandise are brand name products, i.e., GOOD SEASON SALAD DRESSING and OLD LONDON PRODUCTS. Kory's Markets, Inc., McDaniels Markets and Daylight Markets (herein

[1] The relevant provisions of the National Labor Relations Act, as amended, are as follows:

"Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents * * *

"* * * * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:

"* * * * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person,

"* * * * * * *

"Provided, further, That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

referred to as Kory, McDaniels and Daylight) separately operate chain retail food supermarkets in the area of Los Angeles, California. All of such markets regularly and customarily purchase, handle, stock and sell products distributed by petitioner.

In early February, 1960, as a result of a labor dispute with petitioner, the above named Union engaged in a strike against petitioner and picketed petitioner's warehouse located in Los Angeles. From February 3rd through March 10th, 1960, the Union, in aid and support of its strike against petitioner, engaged in a campaign to enlist the aid and cooperation of Kory, McDaniels and Daylight to cease doing business with petitioner.

90 In its efforts to win the labor dispute with petitioner, agents of the Union engaged in the following conduct and practices:

1. Told the manager of McDaniels Market No. 14 that the Union had a labor dispute with petitioner. Asked him to cooperate by not dealing with petitioner and by taking petitioner's merchandise off his shelves. Told him that if he failed to cooperate they would pass out handbills to customers. Handbills were passed out but the manager continued his purchases from petitioner. The handbills passed out at this market, as well as at other markets herein mentioned, read as follows:

"To THE PATRONS OF THIS STORE"

"WHOLESALE DELIVERY DRIVERS & SALESMEN'S LOCAL NO. 848 urgently requests that you do not buy the following products distributed by SERVETTE, INC.:

"•BRACH'S CANDY
•SERVETTE CANDY
•GOOD SEASON
SALAD DRESSING
•OLD LONDON PRODUCTS

"The SERVETTE COMPANY which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual 'Yellow Dog' contracts. These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

"The drivers of Servette appreciate your cooperation in this fight."

2. Asked the manager of McDaniels Market No. 18 to remove merchandise distributed by petitioner from his shelves. At a meeting of the store managers of McDaniels, the managers were told by higher officials to use their best judgment in the matter and to do as they thought wise. The manager of McDaniels Market No. 18 either reduced his purchases from or ceased doing business with petitioner.

91 3. Requested the manager of McDaniels Market No. 25 not to handle petitioner's merchandise. He was shown a copy of the handbill. The manager of McDaniels Market No. 25 either diminished or terminated his business with petitioner.

4. Requested the manager of Daylight Market No. 3 to cooperate with them in their dispute with petitioner by not handling petitioner's products, and told him they were passing out handbills to the customers of those markets which refused to cooperate.

5. Told the manager of Kory's Market No. 6 of the dispute with petitioner, showed a copy of the handbill to him, and told him that the handbills would be passed out to his customers unless Kory ceased doing business with petitioner. When the manager told them he would have to check with the main office, handbills were passed out to customers. The next week the manager refused to allow petitioner to stock his shelves. On two subsequent occasions, agents visited this market to ascertain whether or not petitioner's merchandise was on display.

6. Passed out handbills at Kory's Market No. 5.

7. Asked the manager of Kory's Market No. 1 if he would cooperate by removing petitioner's products from his shelves. The manager said he would have to ask advice from his supervisor. Handbilling occurred at this market on two different occasions.

8. Passed out handbills to the customers of Kory's Market No. 2 and told the manager that they would stop handbilling if he would cease handling petitioner's products.

9. Passed out handbills to customers of Kory's Market No. 3.

Handbilling occurred at certain of the markets above mentioned which purchased GOOD SEASON SALAD DRESSING and OLD LONDON PRODUCTS not from petitioner but from

Certified Grocers of Southern California, another distributor not involved in the labor dispute existing between petitioner and the Union.

92 The Board, with one member dissenting, concluded that the conduct and practices of the Union did not constitute a violation of § 8(b)(4)(i)(B) and that the handbilling of the various markets doing business with the petitioner was protected by the publicity proviso to § 8(b)(4).

In its decision and order, the Board stated, in part, as follows:

> "We agree with the Trial Examiner's conclusion that the appeal to the various store managers doing business with Servette did not constitute a violation of Section 8(b)(4)(i)(B), since the record establishes that the store managers whom the respondent sought to persuade not to do business with Servette were not 'individuals' as that term is used in Section 8(b)(4)(i)(B). We do so, however, only for the reasons set forth in the Carolina Lumber Company [2] and Minneapolis House Furnishing Company [3] cases. • • •
>
> "We also agree, on the basis of our recent Lohman Sales Company decision,[4] that the Respondent's handbilling of the various stores doing business with Servette was protected by the publicity proviso to Section 8(b)(4)."

The dissenting member stated, in part, as follows:

> "As I pointed out in my dissenting opinion in Lohman Sales, 132 NLRB No. 67, the proviso to Section 8(b)(4) does not protect handbilling of secondary employers in furtherance of a dispute with a distributor; the proviso contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette does not produce any products.
>
> "Accordingly, I would find the Respondent's threats to handbill, and its subsequent handbilling activities,

---

[2] *Local 505, International Brotherhood of Teamsters, et al. (Carolina Lumber Company)*, 130 NLRB p. 1438 (Mar. 17, 1961).

[3] *Upholsterers Frame & Bedding Workers Twin City Local No. 61, etc. (Minneapolis House Furnishing Company)*, 132 NLRB p. 40 (July 11, 1961).

[4] *International Brotherhood of Teamsters, etc. Local 537 and Jack M. Lohman*, 132 NLRB p. 901 (Aug. 10, 1961).

constitute violations of Section 8(b)(4)(ii)(B) of the Act."

93 The position of the Board, as stated in its reply brief, appears in the following language:

"In the Board's view, the Union's appeals to the various retail store managers did not constitute a violation of Section 8(b)(4)(i)(B) because, although the forbidden object existed, the means for attaining that object which the Section proscribes was lacking. That is, the only persons induced were the store managers who cannot be regarded as 'any individual employed by any person' within the meaning of Section 8(b)(4)(i)(B). Rather, the store managers must be considered as 'any person' under Section 8(b)(4)(ii), and as such, entitled to protection against the type of conduct or means specifically proscribed therein, namely, threats, coercion, or restraint."

Admittedly, each of the store managers is an individual and each is employed by a person engaged in commerce. It is the petitioner's contention that the clear wording of the phrase "any individual employed by any person" leaves no room for any construction that would exclude "supervisors" from the category described in the phrase. Petitioner also asserts that Congressional history fortifies petitioner's contention that Congressional intent in the choice of the language employed in the phrase was to make it an unfair labor practice for a union to induce or encourage "supervisors" where an object is to force or require any employer "to cease doing business with any other person."

The issue thus created arises under the amendments made to § 8(b)(4)(A) (P.L. 86-257, 73 Stat. 519, approved Sept. 14, 1959). For the amended law, see Footnote 1, *supra*.

Section 8(b)(4)(A) provided:

"It shall be an unfair labor practice for a labor organization or its agents—

"(4) to engage in, or to induce or encourage the *employees of any employer* to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

94 "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." [Emphasis supplied.]

In its Carolina Lumber Company case, *supra*, upon which the Board rested its decision in the instant case, the above Section was held by the Board not to be applicable to inducement of supervisors[6] because they were not employees within the meaning of the Act,[6] and, further, that Section was held not to apply to the inducement of farm, railway, or public employees for the same reason.[7] It is to be noted (see Footnote 1, *supra*) that § 8(b)(4)(i)(B) substitutes the phrase "any individual employed by any person" for the phrase "employees of any employer" as used in § 8(b)(4)(A).

The Board recognized in its decision in the Carolina Lumber Company case, *supra*, "[t]hat the new law bars inducement of a broader category of employed persons tha[n] the old * * *" but concluded from legislative history that " 'any individual employed by any person' in 8(b)(4)(i) refers to supervisors who in interest are more nearly related to 'rank-and-file employees' than to 'management,' as the term is generally understood. On the other hand, the term 'person' as used in
95 8(b)(4)(ii) would seem to refer to individuals more nearly related to the management level. So construed, 8(b)(4)(i) would outlaw attempts to induce or encourage em-

[6] Title 29 U.S.C., § 152(11), provides:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[6] Title 29 U.S.C., § 152(3), in pertinent part, provides:

"The term 'employee' * * * shall not include * * *, or any individual employed as a supervisor, * * *."

[7] *Sheet Metal Workers International Association, Local Union No. 28, (Ferro Co Corporation)*, 102 NLRB 1660 (supervisors); *W. T. Smith Lumber Company*, 116 NLRB 1756, reversed 246 F. 2d 129 (C.A. 5) (railroad employees); *Paper Makers Importing Co., Inc., et al.*, 116 NLRB 267 (municipal employees).

ployees and some supervisors, to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage others more nearly related to the managerial level for the same objectives would be lawful. However, if in the latter case the labor organization went beyond persuasion and attempted to coerce such managerial officials to accomplish the proscribed objectives, it would violate 8(b)(4)(ii)."

While the Board concedes that the substituted phrase "any individual employed by any person" for the phrase "employees of any employer," shows on its face a Congressional intent to broaden the category of employed persons and that the literal meaning of the language employed by Congress is broad enough to include "supervisors" in the category described in the Section as "any individual employed by any person," it urges, nevertheless, that to give the phrase the construction urged upon us by the petitioner would be contrary to the purpose of the Act, contrary to Congressional intent, and would render § 8(b)(4)(ii)(B) of the Act meaningless and futile.

Before giving further consideration to the problem before us, we note that the definition of "supervisor" in the Act (see Footnote 5, *supra*) is broad. It means

> "* * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It has long been settled by court decisions that an employee must be classified as a supervisor if he exercises any one of the powers set forth in § 2(11) of the Act. *National Labor Relations Bd. v. Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (6th Cir. 1948), *cert. denied* 335 U.S. 908; *Ohio Power Co. v. N.L.R.B.*, 176 F. 2d 385 (6th Cir. 1949), *cert denied* 338 U.S. 899; *N.L.R.B.* v. *Fullerton Publishing Company*, 283 F. 2d 96 545 (9th Cir. 1960); *N.L.R.B. v. Southern Airways Company*, 290 F. 2d 519 (5th Cir. 1961). Supervisory status is determined by the powers and duties of an employee, and not be his title. *National Lab. Rel. Bd. v. Southern Bleachery & Pr. Wks.*, 257 F. 2d 235 (4th Cir. 1958), *cert. denied* 359 U.S. 911.

The court decisions are in accord with legislative history, as noted in *N.L.R.B. v. Southern Airways Company, supra*, at p. 523:

> "The legislative history of § 2(11) is helpful in this regard. The Senate Report envisaged a 'supervisor' under the Act as being an employee 'vested with such general management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. * * *' Sen. Rep. 105, 80th Cong.; 1 Leg. His. of the L.M.R.A. p. 410; Poultry Enterprises Inc. v. N.L.R.B., 5 Cir., 1954, 216 F. 2d 798, 801. As expressed on the floor of the Senate, to come within this category the individual should 'direct responsibly' the action of employees under him. 2 Leg. His. of the L.M.R.A., p. 1303; N.L.R.B. v. Swift & Co., 9 Cir., 1957, 240 F. 2d 65, 66 note 1. The Conference Report on the Bill later enacted into § 2(11) shows that the definition was intended to cover persons 'generally regarded as foremen and persons of like or higher rank.' 1947 U.S. Code Cong. & Admin. News, pp. 1135, 1141."

It is clear to us that under the old Section insofar as relevant to the problem before us, "employees of an employer" embraced all employees except supervisors as defined in the Act and that there existed but one category of employees who were excluded from the term "employees" and that category was by law defined as "supervisors."

It must be assumed that members of Congress were aware of the definitions contained in the Act and the unanimity of court decisions construing the same.

Since a supervisor is an individual employed by an employer and since by the provisions of the Act (See Footnote 6, *supra*) the term "employee" does not include any individual employed as a supervisor, it appears clear that when Congress
97 amended the phrase "the employees of any employer" to read "any individual employed by any person," Congress intended by the plain, unambiguous language used to include supervisors in the category described in the amendment as "any individual employed by any person."

Under the view that the plain meaning of the language used by Congress was at variance with the purpose of the Act and the intent of Congress, the Board resorted to legislative history and concluded that:

> " 'any individual employed by any person' in 8(b)(4)(i) refers to *supervisors who in interest are more nearly related to 'rank-and-file employees' than to 'management,'* as the term is generally understood. On the other hand, the term 'person' as used in 8(b)(4)(ii) would seem *to refer to individuals more nearly related to the management level.* So construed 8(b)(4)(i) would outlaw attempts to induce or encourage *employees and some supervisors*, to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage *others more nearly related to the managerial level* for the same objectives would be lawful. * * *" [Emphasis ours.]

By such construction, the Board creates two categories of "supervisors" contrary to the definition of the term "supervisor" as used in the Act and contrary to court decisions. In one category are supervisors related to rank-and-file employees, and in the other category are supervisors more related to management. The Board's construction also requires that the phrase "any person engaged in commerce," appearing in § 8(b)(4)(i), shall be given a different meaning than the same phrase appearing in § 8(b)(4)(ii). The Board's construction would place labor organizations in an untenable and precarious position. Such construction in many instances would force labor organizations to run the risk of committing unfair labor practices without knowing which "supervisors" of an employer they could or could not lawfully induce or encourage and which "supervisors" are or are not persons engaged in commerce under § 8(b)(4)(ii).

The Board also contends that if the plain meaning of the language used in the new law be followed, § 8(b)(4)(ii)
98 would be rendered meaningless and futile because the word "induce" appearing in § 8(b)(4)(i) has the same meaning as the word "threaten" appearing in § 8(b)(4)(ii). Our research leads us to the conclusion that the two words have separate and distinct meanings.

The Board contends that the plain meaning of § 8(b)(4)(i) is at variance with the purpose of the National Labor Relations Act and contrary to the intent of Congress.

The Supreme Court, in *United States v. Amer. Trucking Ass'ns*, 310 U.S. 534, at pp. 543-544, stated:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, the Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" [Footnotes omitted.]

If under the above quoted decision, resort may properly be made to legislative history, we find therein no basis for the Board's contentions.

The basic purpose of the National Labor Relations Act is to promote industrial peace through collective bargaining and an orderly settlement of disputes.

The evil which Congress sought to correct, as stated by Representative Griffin, is as follows:

"Present law provides that it is unlawful for a union to induce or encourage 'employees of any employer' to engage in a strike or 'concerted refusal' to do their work
99 for one of the forbidden objects listed in Section 8(b)(4)—such as to force their Employer to cease doing business with a 'primary employer.' Since farm laborers, railway labor and supervisors are not 'employees' within the meaning of the Act, unions may now, without penalty, induce them to engage in secondary boycotts. This bill corrects this by changing the word 'employees' in the phrase quoted above to 'any individual employed by any person.' This change appears in clause 4(i)." (Legislative History of the Labor Management and Disclosure Act of 1959, Vol. II, pp. 1520–1523 (G.P.O. 1959)).

In explaining this change, then Senator Kennedy and Representative Thompson, his conference associate, submitted an analysis of the differences between the House and Senate bills before the Conference Committee (105 Cong. Rec. 16589; II Leg. Hist. 1706–1707) with the following comment:

> "In some industries supervisors belong to the union of the rank-and-file workers or as ex-members are sympathetic to it. Occasionally a union has induced the supervisors of a secondary employer to refuse to handle the goods of some primary employer with whom the union had a dispute. This conduct causes a true secondary boycott but it does not violate section 8(b)(4)(A) because section 8(b)(4)(A) forbids only the inducement of 'employees' and supervisors are not 'employees' within the statutory definition.
>
> "• • • • •
>
> "The House bill would extend the prohibition to inducement of supervisors. The present omission is an illogical loophole which should be closed if any legislation dealing with secondary boycotts is enacted. The substance of the House bill is therefore acceptable upon this issue."

Senator Morse, one of the conferees on the part of the Senate, who spoke in favor of the conference bill's provision, stated (105 Cong. Rec. 17882; II Leg. Hist. 1426):

> "There are many instances also where a secondary boycott is conducted by a union agent going to a supervisor of employees, who often is a union member, and inducing him to shut off deliveries. Since the supervisor is subject to union discipline, such inducement would be clearly as effective as though inducement were applied to employees themselves."

Senator Humphrey stated, as follows:

> "[T]he amendment proposed by the Senator from Arizona [Mr. Goldwater] would change the words 'employees of any employer' to 'any individual employed by any person', and would delete the word 'concerted' • • •
>
> "As it now stands, section 8(b)(4) does not prohibit appeals or requests directed to supervisory or managerial employees because these individuals are not employees within the statutory definition. But they are surely

individuals; and to substitute the word 'individual' for the word 'employees' would place requests and appeals to them within the prohibition of the law." Remarks of Senator Humphrey on the Goldwater amendment, 105 Daily Cong. Rec. 5580, April 17, 1959, II Leg. Hist. 1037.

In the Senate Committee analysis of this change, it is stated:

"The present law bans the inducement of employees of a secondary employer when the object thereof is to cease doing business with another employer. The revision includes the following features * * *. (2) Inducement of a single employee or a supervisor employed by a secondary employer is banned. * * *" Senate Committee Analysis, Committee print, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Congress, First Session, Sept. 10, 1959, I Leg. Hist. 965.

We do not agree that the plain wording of the new amendment is at variance with the purpose of the Act or the intent of Congress.

Our attention has been called to the fact that the Second Circuit in *N.L.R.B.* v. *Local 294, Internat'l Bro. of Teamsters, etc.*, 298 F. 2d 105 (2d Cir. 1961), has reached a different result from that reached in this opinion. We have reviewed such opinion but are not persuaded. Rather, we are persuaded by the following quotation from *Crooks* v. *Harrelson*, 282 U.S. 55 (1930), at p. 60, where the Court stated:

"Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching
101 from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd to entail great hardship. But an application of the principal so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson v. Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the

law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *In re Alma Spinning Company*, L. R. 16 Ch. Div. 681, 686; *King* v. *Commissioners*, 5 A. & E. 804, 816; *Abley* v. *Dale*, L.J. (1851) N.S. Pt. 2, Vol. 20, 233, 235. And see generally *Chung Fook v. White*, 264 U.S. 443, 445; *Commr. of Immigration v. Gottlieb*, 265 U.S. 310, 313."

We disagree with the Board's conclusion that the handbilling of the various markets doing business with the petitioner was protected by the publicity proviso to § 8(b)(4). The proviso does not protect threats to handbill and handbilling of secondary employers in furtherance of a dispute with a distributor. Petitioner is a distributor and does not produce any products. The effect of the proviso in the case of a distributor is fully discussed in the opinion of this Court in *Great Western Broadcasting Corporation v. N.L.R.B.*, No. 17698, filed Nov. 9, 1962. We deem it unnecessary to repeat here what is stated in that opinion.

The Board erred in dismissing the unfair labor practice complaint. The Board's decision, findings and order are and each of them is set aside. The cause is remanded to the Board for further proceedings consistent with the views expressed herein.

[File endorsement omitted.]

102 In United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Decree—Endorsed and Filed November 26, 1962

Before: CHAMBERS and JERTBERG, Circuit Judges, and CLARK, District Judge

THIS CAUSE came on to be heard upon the petition of Servette, Inc., filed December 14, 1961 to review an order of the NLRB issued by it on October 30, 1961 and

The Court heard arguments of respective counsel on July 12, 1962 and has considered the briefs and transcript of record filed in this Cause. On November 26, 1962 the Court being fully advised in the premises, handed down its decision, in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the Board's decision, findings and order are and each of them is set aside and that this cause be and hereby is remanded to the said National Labor Relations Board for further proceedings consistent with the view expressed in the opinion of this Court.

[File endorsement omitted.]

103 In the United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion for Clarification of Remand—December 11, 1962

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The National Labor Relations Board respectfully moves this Court to clarify its opinion filed November 26, 1962, remanding the above cause to the Board for further proceedings.

1. In its opinion, the Court reversed the Board on two counts. First, the Court held, contrary to the Board, that the various retail store managers constituted "any individual employed by any person" within the meaning of Section 8(b)(4)(i) of the Act, and, accordingly, that the action of the Union in appealing to these store managers, with an object of forcing them to cease doing business with Servette, Inc., violated Section 8(b)(4)(i)(B). Secondly, the Court held, contrary to the Board, that the Union's handbilling at the various stores was not protected by the "publicity" proviso to Section 8(b)(4), because the "proviso does not protect threats to handbill and handbilling of secondary employers in furtherance of a dis-

pute with a distributor," such as petitioner Servette. In
104 this regard, the Court adopted the rationale set forth in its opinion in *Great Western Broadcasting Corp.* v. *N.L.R.B.*, No. 17698, filed November 9, 1962. The Court remanded the instant case to the Board "for further proceedings consistent with the views expressed herein."

2. In *Great Western*, the Court held that the union's appeals and related conduct, directed to customers of advertisers on the radio station with whom the union had its primary dispute, were not privileged by the "publicity" proviso to Section 8(b)(4) because that merely covered a situation where the primary employer was a manufacturer of a physical product. The Court, however, remanded the case to the Board to determine two questions. First, the Board was directed to determine whether the union's activity constituted "threats, restraint or coercion" within the meaning of Section 8(b)(4)(ii), and second, whether such activity was protected by the free speech provisions of the First Amendment. The Board intends to accept the remand in *Great Western* and make the additional findings directed by the Court.

3. Since the proviso question in this case was decided on the basis of *Great Western*, and since in the latter the Court left open, pending amplification of the Board's views, its conclusion on the further question of whether handbilling and related conduct, though not protected by the proviso, may nonetheless be privileged on other grounds, it would appear that the Board should be free to pass on these other grounds on the remand in this case as well. For, since the Court in *Great Western* has indicated that it cannot finally decide
105 whether handbilling and related activity is violative of Section 8(b)(4)(ii) absent a fuller statement of Board views on the question of whether such activity constitutes "threats, restraint or coercion," or is constitutionally protected, it is hardly likely that it could have decided those questions here. The Court does not discuss those issues in its opinion in this case, and the treatment thereof in the Board decision here was no fuller than that in *Great Western*.

Indeed, if the issues of restraint and coercion and constitutionality are not open on the remand in this case, as they are in *Great Western*, the Board would be placed in an anomalous position, were it desirous of seeking further review of this Court's holding on the scope of the publicity proviso; it would

be required to seek Supreme Court review before that Court had the benefit of the views of this Court on all of the issues which were relevant to a final disposition of the problem.[1]

106 4. The Court's opinion in this case leaves us in doubt as to whether the issues left open on the remand in *Great Western* are left open on the remand here. We therefore request that the Court amend its opinion herein to make clear that, on the remand, the Board may determine whether the handbilling constituted a threat, restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act, or was constitutionally protected free speech.

Respectfully submitted,

(S) MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington 25, D.C., this 11th day of December, 1962.

107 In the United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitioner's Reply to Respondent's Motion for Clarification of Remand—Filed December 21, 1962

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The respondent, the National Labor Relations Board, on December 11, 1962, moved this Court to clarify its Opinion

[1] Nor is a different conclusion required by the fact that, unlike in *Great Western*, the union did not intervene here and specifically raise the restraint and coercion and constitutional questions. The basic question presented is whether the Board properly found that the union's handbilling was not violative of Section 8(b)(4)(ii)(B) of the Act. The Court having rejected the reason assigned by the Board, i.e., that the activity is protected by the proviso, the issue necessarily arises whether the activity is restraint or coercion to begin with, or constitutionally protected. For, unless it amounts to restraint or coercion and is not protected by the Constitution, there can be no violation of Section 8(b)(4)(ii)(B).

filed November 26, 1962, remanding the above cause to the Board for further proceedings consistent with the views expressed in the Court's Opinion. Petitioner takes exception to respondent's Motion and urges upon this Court that its Opinion, holdings and decision in the instant action are clear and proper and need no further clarification.

1. Respondent obviously does not and cannot have any cause to seek clarification of the Court's principal holding in the above case, to wit, that various retail store managers constituted "any individual employed by any person"
108 within the meaning of Section 8(b)(4)(i) of the Act, and, accordingly, the action of the Union in appealing to these store managers with an object of forcing them to cease doing business with Servette, Inc. violated Section 8(b)(4)(i)(B).

2. Respondent, however, urges that this Court should direct the Board to determine whether there was also a violation of Section 8(b)(4)(ii) of the Act notwithstanding the fact that the Court in its Opinion held that the "publicity proviso" to Section 8(b)(4) does not protect threats to handbill and handbilling of secondary employers in furtherance of a dispute with a distributor.

Respondent asks this Court to direct that the Board "determine whether the handbilling constituted a threat, restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act, or was constitutionally protected free speech."—*Neither of these defenses to the Union's illegal activities was raised or discussed by the Board in the prior proceedings nor urged or raised before this Court in the briefs or arguments.*

3. It is true that in *Great Western Broadcasting Corp.* v. *NLRB*, No. 17698, filed November 9, 1962 (and argued the same day as the instant cause), the Court directed the Board to proceed to hear the matter and to determine whether
109 the Union's activity there constituted "threats, restraint, or coercion" and whether such activity was protected by the First Amendment. But it is apparent that these issues were timely raised and argued before this Court in the *Great Western* case and were not in any shape, manner or form addressed to this Court in the instant action.

4. Indeed, the Board in the instant cause, both before this Court and in the proceeding below, assumed and accepted as a fact and as a matter of law that the Union's handbilling of

the various stores doing business with petitioner constituted "threats, restraint or coercion" within the meaning of Section 8(b)(4). See the Board's decision at 133 NLRB 1501 (1961). In that proceeding, the Board's reliance upon *International Brotherhood of Teamsters Local 537 (Lohman Sales Company)*, 132 NLRB No. 67 underscores the Board's conclusion that such activity is presumptively violative of Section 8(b)(4)(ii). Respondent did not challenge this conclusion, though counsel for petitioner noted its importance in oral argument and distinguished the posture of this case with that of *Great Western*.

5. Moreover, at no time did anyone, either in the proceedings before the Board or before this Court, raise the
110 issue of the constitutional free speech protection in the instant case. At the time of oral argument, counsel for petitioner, again distinguishing the fact that the constitutional issue had not been raised in this case though it was being raised in the *Great Western* case, noted that such a constitutional issue was not properly before this Court and that constitutional issues should not be anticipated, citing

> *Longshoremen's Union* v. *Boyd*, (1954) 347 U.S. 222, 223–224;
> *United States* v. *Hayman* (1952) 342 U.S. 205, 223;
> *Paramino Lumber Co.* v. *Marshall* (9 Cir. 1938) 95 F. 2d 203, 206; certiorari denied (1938) 305 U.S. 603.

As the Supreme Court in *Parker* v. *Los Angeles County* (1949) 338 U.S. 327, 333, stated: "This is not what is invidiously called a technical rule. The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."

6. Furthermore, the statute specifically necessitates that the Court is prohibited from considering objections, and by nec-
essary inference in this kind of case, arguments that had
111 not been urged before the Board. Section 10(e)(f) of the Labor Management Relations Act states:

> "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

The Supreme Court of the United States has recognized the effect to be given to Section 10(e) and has repeatedly held that the failure to raise such an objection, and by inference to urge such an argument, prevents the court from considering such matters. See *NLRB* v. *Local 476 AFL–CIO*, 7 L. Ed. 2d 382; *NLRB* v. *Cheney-California Lumber Co.* 327 U.S. 385, 90 L. Ed. 739; *NLRB* v. *Ochoa Fertilizer Corp.* 7 L. Ed. 2d 312; 49 Stat. 454, as amended, 29 U.S.C. § 160(4).

"As a general proposition * * * points not raised and preserved below will not be considered on appeal unless they amount to 'fundamental error'." 1A *Moore's Federal Practice* 4231. Cf., *Fowler* v. *Crown-Zellerbach Corp.* 163 F. 2d 773 (Ninth Cir., 1947).

112 7. The Court properly did not leave open the issues in the instant action that were properly left open on remand in *Great Western*. The Court decided all the issues that were presented to it and it would now be an abuse of judicial process to raise additional issues that should have been raised by respondent prior to this late stage.

Respectfully submitted,

HILL, FARRER & BURRILL,
By Stanley E. Tobin.
CARL M. GOULD.
STANLEY E. TOBIN.

DECEMBER 17, 1962.

113 [Certificate of service omitted in printing.]

114 In United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Order Denying Motion—January 22, 1963

Before: CHAMBERS and JERTBERG, Circuit Judges, and CLARK, District Judge

On November 26, 1962, this Court filed its opinion remanding the above cause to the board for further proceedings consistent with the views expressed therein.

The National Labor Relations Board has moved this Court to amend its opinion so that the Board on remand may determine whether the handbilling constituted a threat, restraint, or a coercion within the meaning of § 8(b)(4)(ii) of the Act, or was constitutionally protected free speech.

Neither of these defenses to the Union's illegal activities was raised or discussed by the Board in the prior proceedings nor urged or raised before this Court in the briefs or arguments.

The Board's reliance upon *Great Western Broadcasting Corp.* v. *N.L.R.B.*, No. 17698, filed November 9, 1962 (9th Cir.) is misplaced. In *Great Western* the labor unions intervened in the proceedings and raised the restraint, coercion and constitutional questions. The first intimation of such grounds in the instant case was raised on the motion for clarification.

The motion of the Board is denied. See *Partenweederei, MS Belgrano,* and *Rudolph A. Oetker* v. *George Weigel,* No. 17178, filed December 11, 1962 (9th Cir.). See National Labor Relations Act, as Amended, 29 U.S.C. § 160(e): "No objection

115 that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[File endorsement omitted.]

116 Supreme Court of the United States
No. ——, October Term, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

SERVETTE, INC.

Order Extending Time To File Petition for Writ of Certiorari—February 21, 1963

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED, That the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

April 25, 1963.

WM. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this 21st day of February, 1963.

117 Supreme Court of the United States

No. 1053, October Term, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

SERVETTE, INC.

Order allowing certiorari—June 10, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and a total of one and one-half hours is allowed for oral argument. The case is set for oral argument immediately following No. 921.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1963

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	4
C. The decision of the court of appeals	5
Reasons for granting the writ	5
Conclusion	17
Appendix A	1a
Appendix B	38a

CITATIONS

Cases:

A. L. Phillips, Inc. v. *Walling*, 324 U.S. 490	13
Alpert v. *Excavating & Building Material Chauffeurs, Local 379*, 184 F. Supp. 558	11
Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Peyton Packing Company, Inc.), 131 NLRB 406	11
Auburn Draying Co. v. *Wardell*, 227 N.Y. 1, 124 N.E. 97	14
Bossert v. *Dhuy*, 221 N.Y. 342, 117 N.E. 582	14
Excavating and Building Material Chauffeurs and Helpers Local Union No. 379 (Consalvo Trucking, Inc.), 132 NLRB 827	11
Goldfinger v. *Feintuch*, 276 N.Y. 281, 11 N.E. 2d 910	14

883391—63——1

Cases—Continued

	Page
Great Western Broadcasting Corporation (KXTV), 134 NLRB 1617, reversed and remanded, 310 F. 2d 591	5, 16
International Brotherhood of Teamsters, etc., and Dairy Employees Local 537 (Lohman Sales Company), 132 NLRB 901	4, 5, 11
Local 294, IBT (Van Transport Lines, Inc.), 131 NLRB 242	11
Local 324, International Union of Operating Engineers (Brewer's City Coal Dock), 131 NLRB 228	11
Local Union No. 505, IBT (Carolina Lumber Co.), 130 NLRB 1438	4, 9, 11
McComb v. *Blue Star Auto Stores*, 164 F. 2d 329	13
McComb v. *Wyandotte Furniture Co.*, 169 F. 2d 766	13
Middle South Broadcasting Co., 133 NLRB 1698	16
National Labor Relations Board v. *Fruit & Vegetable Packers, No. 921*, this Term	16
National Labor Relations Board v. *Local 294, Teamsters* (Van Transport Lines), 298 F. 2d 105	11
Sheet Metal Workers International Association, Local Union No. 299 (S. M. Kisner and Sons), 131 NLRB 1196	11
Teamsters, Chauffeurs, Warehousemen & Helpers, Local 901 (Editorial "El Imparcial," Inc.), 134 NLRB 895	11
United States v. *Montgomery Ward & Co.*, 150 F. 2d 369	13
Upholsterers Frame & Bedding Workers Twin City Local No. 61 (Minneapolis House Furnishing Co.), 132 NLRB 40	11

Cases—Continued Page
Walling v. *Friend*, 156 F. 2d 429 13
Walling v. *Mutual Wholesale Food Co.*, 141 F. 2d 331 13
Warehouse Employees Union, Local 730 (C. R. Sheaffer and Sons), 136 NLRB 968 11
Statute:
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2, 38a
Section 2(1), (2), (3), (11) 38a–39a
Section 8(b)(4)(i), (ii)(B) 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 39a
29 U.S.C. 203(j) 13
50 U.S.C. App. (1946 ed.) 1503 13
Miscellaneous:
105 Cong. Rec. 14347, 15532, 16589–16590, 17881–17882, 19849; II Leg. Hist of the Labor-Management Relations and Disclosure Act of 1959 (G.P.O., 1959), 1522–1523, 1568, 1706–1707, 1426, 1822 10
105 Cong. Rec. 16591; II Leg. Hist. 1708 15
105 Cong. Rec. 17333; II Leg. Hist. 1383 15
105 Cong. Rec. 17720; II Leg. Hist. 1388–1389 15
105 Cong. Rec. 17898–17899; II Leg. Hist. 1431–1432 15
Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess. on S. 505, *et seq* 10
Gregory, *Labor and the Law* (Norton, 1961 ed.) 14
Gromfine, *Labor's Use of Secondary Boycotts*, 15 Geo. Wash. L. Rev. 327 14

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SERVETTE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit entered in this case on November 26, 1962.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–17a) is reported at 310 F. 2d 659. The findings of fact, conclusions of law, and order of the Board (R. 36–41) [1] are reported at 133 NLRB 1501.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1962 (App. A, *infra*, p. 20a). A

[1] "R." refers to the Transcript of Record in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

motion for clarification of opinion, filed by the Board, was denied on January 22, 1963 (App. A, *infra*, pp. 18a–19a). On February 21, 1963, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including April 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether it violates the National Labor Relations Act for a labor union, without threats or coercion, to ask the managers of retail stores who are authorized to select the sources of goods for resale to cease to patronize a supplier which the union considers unfair.

2. Whether it violates the National Labor Relations Act for a labor union to pass out handbills outside a retail store calling attention to the fact that the store carries products of a wholesaler which the union considers unfair, and asking the public not to purchase such products.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 38a–40a.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Respondent Servette is a wholesale distributor of candy, holiday supplies, and specialty merchandise in the Los Angeles area (R. 18; 4). Kory's Markets, Inc., McDaniels Markets, and Daylight Markets (here-

in referred to as Kory, McDaniels, and Daylight) separately operate chain retail food supermarkets in that area (R. 18–19; 71). Kory, McDaniels, and Daylight regularly and customarily purchase, handle, stock and sell products distributed by Servette (R. 18–19; 56, 59–60, 61–65, 67–71).

In early February 1960, as a result of a labor dispute with Servette, the Union struck and picketed Servette's warehouse in Los Angeles (R. 19; 74–75). From February 3 through March 10, 1960, the Union, in furtherance of its strike against Servette, approached the managers of a number of retail markets stocking products distributed by Servette and asked them to cooperate with the Union by not dealing with Servette. In most instances the Union advised these managers that, if they continued to deal with Servette, the Union would pass out handbills to the customers of the stores. If the stores failed to cooperate, the Union in fact distributed these handbills which read as follows (R. 20; 84, 54–55):

TO THE PATRONS OF THIS STORE

WHOLESALE DELIVERY DRIVER. & SALESMEN'S LOCAL NO. 848 urgently requests that you do not buy the following products distributed by SERVETTE, INC.:

* BRACH'S CANDY
* SERVETTE CANDY
* GOOD SEASON SALAD DRESSING
* OLD LONDON PRODUCTS

The SERVETTE COMPANY which distributes these products refuses to negotiate with the

Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts. These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of SERVETTE appreciate your cooperation in this fight.

Several store managers stopped handling Servette products.[2]

B. THE BOARD'S CONCLUSIONS AND ORDER

Relying upon its decision in *Local Union No. 505, IBT (Carolina Lumber Co.)*, 130 NLRB 1438, the Board concluded that the Union's appeal to the various store managers did not violate Section 8(b)(4)(i)(B) of the Act (R. 37–38). In *Carolina Lumber*, the Board had held that Section 8(b)(4)(i) does not prohibit appeals directed to individuals high enough in the managerial hierarchy to control business relations with the primary employer, but only inducements directed to individuals, such as rank-and-file workers and low level supervisors, who merely have power, through work stoppages and related conduct, to put pressure on those higher in the enterprise.

The Board (with Member Rodgers dissenting) further concluded, on the authority of its holding in *International Brotherhood of Teamsters, etc., and Dairy Employees Local 537 (Lohman Sales Com-*

[2] Jerry Finley, the Union's business agent, testified that in the course of its campaign against Servette the Union distributed the handbill described above at "well over 50" retail chain supermarkets in the greater Los Angeles area (R. 77).

pany), 132 NLRB 901, that the Union's handbilling at the various stores doing business with Servette was protected by the "publicity" proviso and thus did not violate Section 8(b)(4)(ii)(B) of the Act (R. 38–40). In *Lohman*, the Board had held that the publicity proviso to Section 8(b)(4) was not limited to a situation where the union's primary dispute was with a manufacturer of products, but applied as well where the primary employer was engaged in other forms of business such as distribution. The Board accordingly dismissed the complaint in its entirety (R. 38).

C. THE DECISION OF THE COURT OF APPEALS

The court below held that Section 8(b)(4)(i) encompasses appeals directed to any supervisory personnel, and that the Union's inducement of the store managers violated that section (App. A, *infra*, pp. 1a–17a). The court held further that the Union's handbilling was not protected by the "publicity" proviso to Section 8(b)(4) because Servette was a distributor. The court followed its decision in *Great Western Broadcasting Corporation* v. *National Labor Relations Board*, 310 F. 2d 591, in which it held that the proviso applied only where the primary employer was a manufacturer of a physical product. (App. A, *infra*, pp. 17a, 21a–37a.) The court therefore set aside the Board's order and remanded the case for further proceedings consistent with its opinion.

REASONS FOR GRANTING THE WRIT

This case brings before the Court two new and important questions arising under the 1959 amend-

ments to the secondary boycott provisions of the National Labor Relations Act. Both have general and basic importance in the Board's administration of the Act. On the first question there is already a conflict between the circuits.

1. The court below erroneously held that it is an unfair labor practice for a labor union to ask store managers, who are themselves responsible for selecting the sources of products sold in their stores, to cease buying the products of another company which the union regards as unfair. It based this ruling upon Section 8(b)(4)(i) which provides that it shall be an unfair labor practice for a labor organization—

> to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services

where an object is to force such person to cease doing business with any other person.

The court wholly misconceived the purport of this provision. It deals with secondary pressure, *i.e.*, with a union's appeal to one or more individuals who work for Firm A to cease performing employment services in order to force Firm A to stop doing business with Firm B, with which the union is engaged in controversy. It is the putting of economic pressure upon Firm A, by cutting off employment services, that Section 8(b)(4)(i) seeks to prevent. The provision leaves the union entirely free to ask

Firm A and all firms similarly situated to join in a primary boycott, *i.e.* to break off their business relations with Firm B so long as the labor dispute continues. The decisive question is whether the union merely requested the appropriate person to make that managerial decision or asked an individual employed by Firm A to quit all or part of his work so as to coerce the firm's decision.

If Firm A is a small individual proprietorship, A is the one who decides whether to continue to deal with Firm B; and Section 8(b)(4)(i) is obviously inapplicable to a union's request that he join in a primary boycott.[1] If Firm A is a corporation, the decision whether to join in the primary boycott must be made by some individual (or group) who is an employee of the corporation with managerial powers. The controlling principle, nevertheless, is the same. If the union merely asks the corporation to join in the primary boycott by addressing itself to the individual with the authority to make that decision, there is no violation. Section 8(b)(4)(i) is violated, if at all, only if the request is that the individual stop performing employment services so as to put secondary pressure upon the managers of Firm A in reaching their decision.

In the present case it is entirely clear that the store managers were merely requested to exercise their authority to decide whether to continue, or cease, buying from Servette. The action they were asked

[1] Section 8(b)(4)(ii) comes into play, as discussed below, if the request is accompanied by a threat or coercion.

to take—the decision they were asked to make—was identical to the request that would be made of an individual proprietor. There was no secondary pressure. Referring to the words of Section 8(b)(4)(i), the store manager was not asked "to engage in a strike" or to do anything "in the course of his employment" that can fairly be described as a refusal "to use, manufacture, process, transport, or otherwise handle or work on any goods" or "to perform any services" with an object of "forcing or requiring" the manager's employer to cease dealing with Servette. The managers were asked only to exercise their managerial authority on behalf of their employers and in accordance with the discretion vested in them by their employers. They were not asked to force or require their employers to do anything at all.

This analysis of Section 8(b)(4)(i) is confirmed by its legislative evolution. Prior to the 1959 amendments Section 8(b)(4)(A) declared it an unfair labor practice for a labor organization—

> to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services

where an object was to force such employer to cease doing business with any other person. That provision was manifestly concerned with inducement of the employees of Firm A to stop working in order to coerce Firm A's decision about doing business with

Firm B. The provision was not aimed at requests to Firm A without the secondary pressure. The 1959 amendments substituted the phrase "individual employed by any person" for "employees of any employer," thus making the provision applicable to employees (in a colloquial sense) who were not technically "employees" within the statutory definitions—government employees, railway and airline employees, and supervisors.[4] The other change struck out the word "concerted" and changed the plurals into the singular, so that secondary pressure became unfair even if the inducement was directed to only one individual. But the central theme of the prohibition was left unchanged—it still runs only against secondary pressure in the form of inducement to refuse to perform employment services.

While the Board has held in other cases that Section 8(b)(4)(i) had no application whatever to managerial employees,[5] there is nothing in the Board's actual decision in this case, or in our position here, inconsistent with the view that any inducement of any individual to refuse to do his normal work is within Section 8(b)(4)(i) no matter how high the individual may rank in the corporate hierarchy. The decisive consideration here is that the Union was requesting managerial employees, not to refuse to perform their work, but to exercise their authorized managerial discretion.

---

[4] See p. 10, n. 6, *infra*.

[5] See *Local Union No. 505, IBT (Carolina Lumber Co.)*, 130 NLRB 1438.

Section 8(b)(4)(ii) buttresses the view that the 1959 amendments permit a labor union to ask an employer—and therefore to ask the authorized managerial employees of a corporation—to join in a primary boycott. That provision, unlike the prior subdivision, does deal with primary boycotts. It forbids a union to "threaten, coerce or restrain" any person where an object thereof is forcing him to cease doing business with any other person. It leaves the union free to request, or beg, or persuade a firm to aid it voluntarily by breaking off relations with an unfair employer, and manifestly there is nothing unlawful in giving such support. The legislative history shows that the words were chosen deliberately in order not to interfere with the union's freedom to obtain truly voluntary assistance from sympathetic employers as had often occurred in the past.[6] As the sponsors of the bill plainly recognized,[7] in the case of a corporation the union's pleas can be directed only to the individuals duly authorized by the corporation to make such decisions in its behalf—in this case the individual store managers.

---

[6] See 105 Cong. Rec. 14347 (Analysis submitted by Congressman Griffin), 15532 (Congressman Griffin), 16589–16590 (Analysis submitted by Senator Kennedy and Congressman Thompson), 17881–17882 (Senator Morse), 19849 (Senator Dirksen); II Leg. Hist. of the Labor-Management Relations and Disclosure Act of 1959 (G.P.O., 1959), 1522–1523, 1568, 1706–1707, 1426, 1822.

[7] See Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess., on S. 505, *et seq.*, pp. 304–306.

The decision below, as the court itself acknowledged, is in conflict with the decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Local 294, Teamsters* (Van Transport Lines), 298 F. 2d 105. See also *Alpert* v. *Excavating & Building Material Chauffeurs, Local 379*, 184 F. Supp. 558, 561 (D. Mass.), where Judge Wyzanski held that Section 8(b)(4)(i) "does not cover appeals to those who on behalf of their employer have power lawfully to terminate, cease, or otherwise control business relations with the so-called primary employer."

The question recurs frequently in the administration of the Act. Already ten other cases have reached the stage of formal Board decision.[8] Fairness to both employers and labor organizations requires that the issue be promptly settled.

---

[8] In addition to the instant case, the other cases which have thus far reached the stage of formal Board decision are: *Local Union No. 505, IBT* (*Carolina Lumber Co.*), 130 N.L.R.B. 1438; *Local 294, IBT* (*Van Transport Lines, Inc.*), 131 N.L.R.B. 242; *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* (*Peyton Packing Company, Inc.*), 131 N.L.R.B. 406; *Sheet Metal Workers International Association, Local Union No. 299* (*S. M. Kisner and Sons*), 131 N.L.R.B. 1196; *Local 324, International Union of Operating Engineers* (*Brewer's City Coal Dock*), 131 N.L.R.B. 228; *Upholsterers Frame & Bedding Workers Twin City Local No. 61* (*Minneapolis House Furnishing Co.*), 132 N.L.R.B. 40; *Excavating and Building Material Chauffeurs and Helpers Local Union No. 379* (*Consalvo Trucking, Inc.*), 132 N.L.R.B. 827; *International Brotherhood of Teamsters, etc., and Dairy Employees Local 537* (*Lehman Sales Company*), 132 N.L.R.B. 901; *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 901* (*Editorial "El Imparcial," Inc.*), 134 N.L.R.B. 895; *Warehouse Employees Union, Local 730* (*C. R. Sheaffer and Sons*), 136 N.L.R.B. 968.

2. The second question of general importance raised by the decision below concerns the scope of the final proviso to Section 8(b)(4). Distributing handbills outside a retail store requesting potential customers not to purchase the goods of a particular supplier, like Servette, would be an unfair labor practice under Section 8(b)(4)(ii) because the union would be coercing or restraining the retailer with the object of forcing it to cease dealing in the products of the supplier, if it were not for the final proviso, which provides that nothing contained in Section 8(b)(4)—

> shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *.

The court below erred in holding the proviso inapplicable. Distributing handbills is certainly a form of publicity and the handbills truthfully advised the public that the stores were distributing the products of Servette with whom the union had a primary dispute. There was no picketing. The store distributed Servette's products. The only question, therefore, was whether the candy, salad dressing and "Old London Products" were "a product or products produced by" Servette.

We submit that the operations of a wholesaler like Servette fall within the quoted phrase. "Produced" is a familiar term in labor law. Even if we assume *arguendo* that, contrary to the Board's view,[*]

[*] See p. 16, n. 10, *infra*.

it is a word of limitation, its well-known meaning is amply broad enough to cover the activities of a wholesaler who buys and stores goods, breaks lots, repackages, relabels or otherwise handles the goods. Under the Fair Labor Standards Act the term "produced" is defined as "produced, manufactured, mined, handled, or in any other manner worked on" (29 U.S.C. 203(j)), and has been long and regularly applied to employees of distributive organizations engaged in obtaining merchandise in large lots and distributing it to smaller outlets. See, *e.g.*, *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490; *Walling* v. *Mutual Wholesale Food Co.*, 141 F. 2d 331, 340 (C.A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C.A. 8); *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329 (C.A. 7); *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C.A. 8).

Similarly, although the War Labor Disputes Act did not include the express definition of "produced" found in the Fair Labor Standards Act, it was held in *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369 (C.A. 7), that the general retail department and mail order business of Montgomery Ward & Co. so far involved the production of goods that these facilities could lawfully be seized under the statute authorizing the seizure of facilities equipped "for the manufacture, production, or mining of any * * * materials" (50 U.S.C. App. (1946 ed.) 1503).

If the word "produced" be given the above described meaning, the proviso, at the very least, has the effect of allowing a labor union to follow down to the retail level products which are handled at any stage in the course of manufacture and distribution by an

employer who fails to conform to what the union regards as fair employment standards. Thus construed, the proviso would permit a labor union to follow an "unfair" product but not to spread the labor dispute more widely through the community by putting pressure upon any firm that had any form of business relations with any firm engaged in a labor dispute. This distinction was well known in labor law and was presumably before the draftsmen of the 1959 amendments. Compare, *Bossert* v. *Dhuy*, 221 N.Y. 342, 117 N.E. 582, and *Goldfinger* v. *Feintuch*, 276 N.Y. 281, 11 N.E. 2d 910, with *Auburn Draying Co.* v. *Wardell*, 227 N.Y. 1, 124 N.E. 97. See also Gromfine, *Labor's Use of Secondary Boycotts*, 15 Geo. Wash. L. Rev. 327, 328; Gregory, *Labor and the Law* (Norton, 1961 ed.), pp. 132–153.

The court below attributed a false significance, we think, to the use of the words "manufacture" and "producer, processor or manufacturer" in earlier parts of Section 8(b)(4). It is evident that these terms were not intended to draw any distinction but, rather, were a proliferation of nouns in order to be sure to cover all forms of activity without distinguishing between them; for all are treated alike. The fact that the draftsmen of the proviso used only the broadest words "product or products" and "produced" does not show that they intended them to cover only a manufacturer narrowly defined. Indeed, if that had been the purpose, the 1959 draftsmen with the earlier words before them would undoubtedly have used the word "manufacturer" or "processor" instead of the broader term "producer."

Similarly, we submit that no significance can be drawn from the fact that another version of the proviso, contained in a request by the Senate conferees for instructions from the Senate, read (105 Cong. Rec. 17333; II Leg. Hist. 1383):

> *Provided,* That nothing contained in this subsection (b) shall be construed * * * to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor dispute * * *.

There was no vote on the request because the Chairman of the Senate Conferees, Senator Kennedy, shortly later reported that the Conferees had accepted the proposals of the Senate's representatives. All the other evidence in the legislative history indicates that the intent of the proviso was to authorize all forms of appeals to the public not to purchase "unfair goods" provided that the publicity was not accompanied by picketing.* Moreover, since any restriction upon publicity other than picketing might raise constitutional questions, the proviso should be broadly construed.

We recognize that a complete delineation of the scope of the proviso will probably require a number of decisions. The Board has not confined the proviso

---

* See 105 Cong. Rec. 16591 (Senator Kennedy and Congressman Thompson), 17720 (Senator Kennedy), 17898–17899 (Senator Kennedy); II Leg. Hist. 1708, 1388–1389, 1431–1432.

to the situation presented in the present case, where the union was following the goods themselves, but has extended it more broadly to publicity involving any economic relations between the establishment where the handbilling takes place and an employer with whom the union is in dispute.[10] Since that question is not raised by the present case, its resolution must await further litigation. Nevertheless, the present issue is important and recurring. Most of the instances of appeals to the general public not to buy unfair products relate to a retailer's distribution of such goods and, in many instances, the union's dispute is with a subsequent processor or wholesaler rather than with the original manufacturer. An early decision upon the present question would contribute greatly to the establishment of principles for the administration of the 1959 amendments to the National Labor Relations Act.

It is particularly appropriate that the Court grant review of this issue now. The Court has before it the related question of whether Section 8(b)(4)(ii)(B) of the Act reaches secondary consumer picketing. *National Labor Relations Board* v. *Fruit & Vegetable Packers*, No. 921, this Term, petition for certiorari pending. At the same time that the Court decides this question, it would be desirable for it to consider, and decide, the extent to which the same secondary objective may be pursued through forms of publicity other than picketing.

---

[10] See *Middle South Broadcasting Co.*, 133 NLRB 1698; *Great Western Broadcasting Corporation (KXTV)*, 134 NLRB 1617, reversed and remanded, 310 F. 2d 591 (C.A. 9).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LEE M. MODJESKA,
Attorney,

National Labor Relations Board.

APRIL 1963.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Nov. 26, 1962

On Petition to Review an Order of the National Labor Relations Board

---

Before: CHAMBERS and JERTBERG, *Circuit Judges*, and CLARK, *District Judge*

JERTBERG, *Circuit Judge:*

This case is before the court upon the petition of Servette, Inc. to review a decision and order of the National Labor Relations Board dismissing an unfair labor practice complaint which had issued upon charges filed by petitioner. The Board's decision is reported at 133 NLRB p. 1501. (Oct. 30, 1961).

The case involves an attempt by the Wholesale Delivery Drivers and Salesmen's Union, Local No. 848, to force several retail markets to cease doing business with petitioner with whom the Union was having a labor dispute. It was charged that the Union activity was proscribed by § 8(b)(4)(i)(ii)(B)

of the National Labor Relations Act, as amended 29 U.S.C. § 158(b)(4)(i)(ii)(B).[1]

The primary facts are not in dispute. Petitioner is a wholesale distributor of specialty merchandise such as candy, liquor, holiday supplies and specialty articles in the area of Los Angeles, California. Included in such merchandise are brand name products, i.e., GOOD SEASON SALAD DRESSING and OLD LONDON PRODUCTS. Kory's Markets, Inc., McDaniels Markets and Daylight Markets (herein referred to as Kory,

---

[1] The relevant provisions of the National Labor Relations Act, as amended, are as follows:

"SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents * * *

* * * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:

* * * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person,

* * * * * *

"*Provided, further*, That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

McDaniels and Daylight) separately operate chain retail food supermarkets in the area of Los Angeles, California. All of such markets regularly and customarily purchase, handle, stock and sell products distributed by petitioner.

In early February, 1960, as a result of a labor dispute with petitioner, the above named Union engaged in a strike against petitioner and picketed petitioner's warehouse located in Los Angeles. From February 3rd through March 10th, 1960, the Union in aid and support of its strike against petitioner, engaged in a campaign to enlist the aid and cooperation of Kory, McDaniels and Daylight to cease doing business with petitioner.

In its efforts to win the labor dispute with petitioner, agents of the Union engaged in the following conduct and practices:

1. Told the manager of McDaniels Market No. 14 that the Union had a labor dispute with petitioner. Asked him to cooperate by not dealing with petitioner and by taking petitioner's merchandise off his shelves. Told him that if he failed to cooperate they would pass out handbills to customers. Handbills were passed out but the manager continued his purchases from petitioner. The handbills passed out at this market, as well as at other markets herein mentioned, read as follows:

"To THE PATRONS OF THIS STORE"

"WHOLESALE DELIVERY DRIVERS & SALESMEN'S LOCAL NO. 848 urgently requests that you do not buy the following products distributed by SERVETTE, INC.:

"• BRACH'S CANDY
• SERVETTE CANDY
• GOOD SEASON SALAD DRESSING
• OLD LONDON PRODUCTS

"The SERVETTE COMPANY which distributes these products refuses to negotiate with

the Union that represents its drivers. The Company is attempting to force the drivers to sign individual 'Yellow Dog' contracts. These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

"The drivers of Servette appreciate your cooperation in this fight."

2. Asked the manager of McDaniels Market No. 18 to remove merchandise distributed by petitioner from his shelves. At a meeting of the store managers of McDaniels, the managers were told by higher officials to use their best judgment in the matter and to do as they thought wise. The manager of McDaniels Market No. 18 either reduced his purchases from or ceased doing business with petitioner.

3. Requested the manager of McDaniels Market No. 25 not to handle petitioner's merchandise. He was shown a copy of the handbill. The manager of McDaniels Market No. 25 either diminished or terminated his business with petitioner.

4. Requested the manager of Daylight Market No. 3 to cooperate with them in their dispute with petitioner by not handling petitioner's products, and told him they were passing out handbills to the customers of those markets which refused to cooperate.

5. Told the manager of Kory's Market No. 6 of the dispute with petitioner, showed a copy of the handbill to him, and told him that the handbills would be passed out to his customers unless Kory ceased doing business with petitioner. When the manager told them he would have to check with the main office, handbills were passed out to customers. The next week the manager refused to allow petitioner to stock his shelves. On two subsequent occasions, agents visited this market to ascertain whether or not petitioner's merchandise was on display.

6. Passed out handbills at Kory's Market No. 5.

7. Asked the manager of Kory's Market No. 1 if he would cooperate by removing petitioner's products from his shelves. The manager said he would have to ask advice from his supervisor. Handbilling occurred at this market on two different occasions.

8. Passed out handbills to the customers of Kory's Market No. 2 and told the manager that they would stop handbilling if he would cease handling petitioner's products.

9. Passed out handbills to customers of Kory's Market No. 3.

Handbilling occurred at certain of the markets above mentioned which purchased GOOD SEASON SALAD DRESSING and OLD LONDON PRODUCTS not from petitioner but from Certified Grocers of Southern California, another distributor not involved in the labor dispute existing between petitioner and the Union.

The Board, with one member dissenting, concluded that the conduct and practices of the Union did not constitute a violation of § 8(b)(4)(i)(B) and that the handbilling of the various markets doing business with the petitioner was protected by the publicity proviso to § 8(b)(4).

In its decision and order, the Board stated, in part, as follows:

> We agree with the Trial Examiner's conclusion that the appeal to the various store managers doing business with Servette did not constitute a violation of Section 8(b)(4)(i)(B), since the record establishes that the store managers whom the respondent sought to persuade not to do business with Servette were not "individuals" as that term is used in Section 8(b)(4)(i)(B). We do so, however, only for the reasons set forth in the *Carolina Lumber*

Company[3] and *Minneapolis House Furnishing Company*[4] cases. * * *

We also agree, on the basis of our recent *Lohman Sales Company* decision,[5] that the Respondent's handbilling of the various stores doing business with Servette was protected by the publicity proviso to Section 8(b)(4).

The dissenting member stated, in part, as follows:

> As I pointed out in my dissenting opinion in *Lohman Sales*, 132 NLRB No. 67, the proviso to Section 8(b)(4) does not protect handbilling of secondary employers in furtherance of a dispute with a distributor; the proviso contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette does not produce any products.
>
> Accordingly, I would find the Respondent's threats to handbill, and its subsequent handbilling activities, constitute violations of Section 8(b)(4)(ii)(B) of the Act.

The position of the Board, as stated in its reply brief, appears in the following language:

> In the Board's view, the Union's appeals to the various retail store managers did not constitute a violation of Section 8(b)(4)(i)(B) because, although the forbidden object existed, the means for attaining that object which the Section proscribes was lacking. That is, the only persons induced were the store managers

---

[3] *Local 505, International Brotherhood of Teamsters, et al. (Carolina Lumber Company)*, 130 NLRB p. 1438 (Mar. 17, 1961).

[4] *Upholsterers Frame & Bedding Workers Twin City Local No. 61, etc. (Minneapolis House Furnishing Company)*, 132 NLRB p. 40 (July 11, 1961).

[5] *International Brotherhood of Teamsters, etc. Local 537 and Jack M. Lohman*, 132 NLRB p. 901 (Aug. 10, 1961).

> who cannot be regarded as "any individual employed by any person" within the meaning of Section 8(b)(4)(i)(B). Rather, the store managers must be considered as "any person" under Section 8(b)(4)(ii), and, as such, entitled to protection against the type of conduct or means specifically proscribed therein, namely, threats, coercion, or restraint.

Admittedly, each of the store managers is an individual and each is employed by a person engaged in commerce. It is the petitioner's contention that the clear wording of the phrase "any individual employed by any person" leaves no room for any construction that would exclude "supervisors" from the category described in the phrase. Petitioner also asserts that Congressional history fortifies petitioner's contention that Congressional intent in the choice of the language employed in the phrase was to make it an unfair labor practice for a union to induce or encourage "supervisors" where an object is to force or require any employer "to cease doing business with any other person."

The issue thus created arises under the amendments made to § 8(b)(4)(A) (P.L. 86-257, 73 Stat. 519, approved Sept. 14, 1959). For the amended law, see Footnote 1, *supra*.

Section 8(b)(4)(A) provided:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (4) to engage in, or to induce or encourage the *employees of any employer* to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. [Emphasis supplied.]

In its *Carolina Lumber Company* case, *supra*, upon which the Board rested its decision in the instant case, the above Section was held by the Board not to be applicable to inducement of supervisors[5] because they were not employees within the meaning of the Act,[6] and, further, that Section was held not to apply to the inducement of farm, railway, or public employees for the same reason.[7] It is to be noted (see Footnote 1, *supra*) that §8(b)(4)(i)(B) substitutes the phrase "any individual employed by any person" for the phrase "employees of any employer" as used in §8(b)(4)(A).

The Board recognized in its decision in the *Carolina Lumber Company* case, *supra*, "[t]hat the new

---

[5] Title 29 U.S.C., §152(11), provides:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[6] Title 29 U.S.C., §152(3), in pertinent part, provides:

"'The term 'employee' * * * shall not include * * *, or any individual employed as a supervisor, * * *."

[7] *Sheet Metal Workers International Association, Local Union No. 28, (Ferro Co Corporation)*, 102 NLRB 1660 (supervisors); *W. T. Smith Lumber Company*, 116 NLRB 1756, reversed 246 F. 2d 129 (C.A. 5) (railroad employees); *Paper Makers Importing Co., Inc., et al.*, 116 NLRB 267 (municipal employees).

law bars inducement of a broader category of employed persons tha[n] the old * * *" but concluded from legislative history that "'any individual employed by any person' in 8(b)(4)(i) refers to supervisors who in interest are more nearly related to 'rank-and-file employees' than to 'management,' as the term is generally understood. On the other hand, the term 'person' as used in 8(b)(4)(ii) would seem to refer to individuals more nearly related to the management level. So construed, 8(b)(4)(i) would outlaw attempts to induce or encourage employees and some supervisors, to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage others more nearly related to the managerial level for the same objectives would be lawful. However, if in the latter case the labor organization went beyond persuasion and attempted to coerce such managerial officials to accomplish the proscribed objectives, it would violate 8(b)(4)(ii)."

While the Board concedes that the substituted phrase "any individual employed by any person" for the phrase "employees of any employer," shows on its face a Congressional intent to broaden the category of employed persons and that the literal meaning of the language employed by Congress is broad enough to include "supervisors" in the category described in the Section as "any individual employed by any person," it urges, nevertheless, that to give the phrase the construction urged upon us by the petitioner would be contrary to the purpose of the Act, contrary to Congressional intent, and would render § 8(b)(4)(ii)(B) of the Act meaningless and futile.

Before giving further consideration to the problem before us, we note that the definition of "supervisor" in the Act (see Footnote 5, *supra*), is broad. It means

> * * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It has long been settled by court decisions that an employee must be classified as a supervisor if he exercises any one of the powers set forth in § 2(11) of the Act. *National Labor Relations Bd.* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (6th Cir. 1948), *cert. denied* 335 U.S. 908; *Ohio Power Co.* v. *N.L.R.B.*, 176 F. 2d 385 (6th Cir. 1949), *cert. denied* 338 U.S. 899; *N.L.R.B.* v. *Fullerton Publishing Company*, 283 F. 2d 545 (9th Cir. 1960); *N.L.R.B.* v. *Southern Airways Company*, 290 F. 2d 519 (5th Cir. 1961). Supervisory status is determined by the powers and duties of an employee, and not by his title. *National Lab. Rel. Bd.* v. *Southern Bleachery & Pr. Wks.*, 257 F. 2d 235 (4th Cir. 1958), *cert. denied* 359 U.S. 911.

The court decisions are in accord with legislative history, as noted in *N.L.R.B.* v. *Southern Airways Company, supra,* at p. 523:

> The legislative history of § 2(11) is helpful in this regard. The Senate Report envisaged a "supervisor" under the Act as being an employee "vested with such general management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. * * *" Sen. Rep. 105, 80th Cong.; 1 Leg. His. of the L.M.R.A. p. 410; *Poultry Enterprises, Inc.* v. *N.L.R.B.*, 5 Cir., 1954, 216 F. 2d 798, 801. As expressed on the floor of the Senate, to come within this category the individual should 'direct responsibly' the

action of employees under him. 2 Leg. His. of the L.M.R.A., p. 1303; *N.L.R.B.* v. *Swift & Co.*, 9 Cir., 1957, 240 F. 2d 65, 66 note 1. The Conference Report on the Bill later enacted into § 2(11) shows that the definition was intended to cover persons "generally regarded as foremen and persons of like or higher rank." 1947 U.S. Code Cong. & Admin. News, pp. 1135, 1141.

It is clear to us that under the old Section insofar as relevant to the problem before us, "employees of an employer" embraced all employees except supervisors as defined in the Act and that there existed but one category of employees who were excluded from the term "employees" and that category was by law defined as "supervisors."

It must be assumed that members of Congress were aware of the definitions contained in the Act and the unanimity of court decisions construing the same.

Since a supervisor is an individual employed by an employer and since by the provisions of the Act (see Footnote 6, *supra*) the term "employee" does not include any individual employed as a supervisor, it appears clear that when Congress amended the phrase "the employees of any employer" to read "any individual employed by any person," Congress intended by the plain, unambiguous language used to include supervisors in the category described in the amendment as "any individual employed by any person."

Under the view that the plain meaning of the language used by Congress was at variance with the purpose of the Act and the intent of Congress, the Board resorted to legislative history and concluded that—

> "any individual employed by any person" in 8(b)(4)(i) refers to *supervisors who in interest are more nearly related to 'rank-and-file*

> *employees' than to 'management,'* as the term is generally understood. On the other hand, the term 'person' as used in 8(b)(4)(ii) would seem *to refer to individuals more nearly related to the management level.* So construed 8(b)(4)(i) would outlaw attempts to induce or encourage *employees and some supervisors,* to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage *others more nearly related to the managerial level* for the same objectives would be lawful. * * * [Emphasis ours.]

By such construction, the Board creates two categories of "supervisors" contrary to the definition of the term "supervisor" as used in the Act and contrary to court decisions. In one category are supervisors related to rank-and-file employees, and in the other category are supervisors more related to management. The Board's construction also requires that the phrase "any person engaged in commerce," appearing in § 8(b)(4)(i), shall be given a different meaning than the same phrase appearing in § 8(b)(4)(ii). The Board's construction would place labor organizations in an untenable and precarious position. Such construction in many instances would force labor organizations to run the risk of committing unfair labor practices without knowing which "supervisors" of an employer they could or could not lawfully induce or encourage and which "supervisors" are or are not persons engaged in commerce under § 8(b)(4)(ii).

The Board also contends that if the plain meaning of the language used in the new law be followed, § 8(b)(4)(ii) would be rendered meaningless and futile because the word "induce" appearing in § 8(b)(4)(i) has the same meaning as the word "threaten" appearing in § 8(b)(4)(ii). Our research leads us to the conclusion that the two words have separate and distinct meanings.

The Board contends that the plain meaning of § 8(b)(4)(i) is at variance with the purpose of the National Labor Relations Act and contrary to the intent of Congress.

The Supreme Court, in *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534, at pp. 543–544, stated:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, the Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." [Footnotes omitted.]

If under the above quoted decision, resort may properly be made to legislative history, we find therein no basis for the Board's contentions.

The basic purpose of the National Labor Relations Act is to promote industrial peace through collective bargaining and an orderly settlement of disputes.

The evil which Congress sought to correct, as stated by Representative Griffin, is as follows:

> Present law provides that it is unlawful for a union to induce or encourage "employees of any employer" to engage in a strike or "concerted refusal" to do their work for one of the

forbidden objects listed in Section 8(b)(4)—such as to force their Employer to cease doing business with a "primary employer." Since farm laborers, railway labor and supervisors are not "employees" within the meaning of the Act, unions may now, without penalty, induce them to engage in secondary boycotts. This bill corrects this by changing the word "employees" in the phrase quoted above to "any individual employed by any person." This change appears in clause 4(i). (Legislative History of the Labor Management and Disclosure Act of 1959, Vol. II, pp. 1520–1523 (G.P.O. 1959)).

In explaining this change, then Senator Kennedy and Representative Thompson, his conference associate, submitted an analysis of the differences between the House and Senate bills before the Conference Committee (105 Cong. Rec. 16589; II Leg. Hist. 1706–1707) with the following comment:

> In some industries supervisors belong to the union of the rank-and-file workers or as ex-members are sympathetic to it. Occasionally a union has induced the supervisors of a secondary employer to refuse to handle the goods of some primary employer with whom the union had a dispute. This conduct causes a true secondary boycott but it does not violate section 8(b)(4)(A) because section 8(b)(4)(A) forbids only the inducement of "employees" and supervisors are not "employees" within the statutory definition.
>
> * * * * *
>
> The House bill would extend the prohibition to inducement of supervisors. The present omission is an illogical loophole which should be closed if any legislation dealing with secondary boycotts is enacted. The substance of the House bill is therefore acceptable upon this issue.

Senator Morse, one of the conferees on the part of the Senate, who spoke in favor of the conference bill's provision, stated (105 Cong. Rec. 17882; II Leg. Hist. 1426):

> There are many instances also where a secondary boycott is conducted by a union agent going to a supervisor of employees, who often is a union member, and inducing him to shut off deliveries. Since the supervisor is subject to union discipline, such inducement would be clearly as effective as though inducement were applied to employees, themselves.

Senator Humphrey stated, as follows:

> [T]he amendment proposed by the Senator from Arizona [Mr. Goldwater] would change the words "employees of any employer" to "any individual employed by any person," and would delete the word "concerted" * * *
>
> As it now stands, section 8(b)(4) does not prohibit appeals or requests directed to supervisory or managerial employees because these individuals are not employees within the statutory definition. But they are surely individuals; and to substitute the word "individual" for the word "employees" would place requests and appeals to them within the prohibition of the law. (Remarks of Senator Humphrey on the Goldwater amendment. 105 Daily Cong. Rec. 5580, April 17, 1959, II Leg. Hist. 1037.)

In the Senate Committee analysis of this change, it is stated:

> The present law bans the inducement of employees of a secondary employer when the object thereof is to cease doing business with another employer. The revision includes the following features * * * (2) Inducement of a single employee or a supervisor employed by a secondary employer is banned. * * * (Senate Committee Analysis, Committee print, Subcommittee on Labor of the Committee on Labor and

Public Welfare, United States Senate, 86th Congress, First Session, Sept. 10, 1959, I Leg. Hist. 965.)

We do not agree that the plain wording of the new amendment is at variance with the purpose of the Act or the intent of Congress.

Our attention has been called to the fact that the Second Circuit in *N.L.R.B.* v. *Local 294, Internat'l Bro. of Teamsters, etc.*, 298 F. 2d 105 (2d Cir. 1961), has reached a different result from that reached in this opinion. We have reviewed such opinion but are not persuaded. Rather, we are persuaded by the following quotation from *Crooks* v. *Harrelson*, 282 U.S. 55 (1930), at p. 60, where the Court stated:

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principal so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson* v. *Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *In re Alma Spinning Company*, L. R. 16 Ch. Div. 681, 686; *King* v. *Commissioners*, 5 A. & E. 804, 816; *Abley* v. *Dale*, L. J. (1851) N. S. Pt. 2, Vol. 20, 233, 235. And see generally *Chung*

Fook v. *White*, 264 U.S. 443, 445; *Commr. of Immigration* v. *Gottlieb*, 265 U.S. 310, 313.

We disagree with the Board's conclusion that the handbilling of the various markets doing business with the petitioner was protected by the publicity proviso to § 8(b)(4). The proviso does not protect threats to handbill and handbilling of secondary employers in furtherance of a dispute with a distributor. Petitioner is a distributor and does not produce any products. The effect of the proviso in the case of a distributor is fully discussed in the opinion of this Court in *Great Western Broadcasting Corporation* v. *N.L.R.B.*, No. 17698, filed Nov. 9, 1962. We deem it unnecessary to repeat here what is stated in that opinion.

The Board erred in dismissing the unfair labor practice complaint. The Board's decision, findings and order are and each of them is set aside. The cause is remanded to the Board for further proceedings consistent with the views expressed herein.

(Endorsed) Opinion Filed Nov. 26, 1962.

FRANK H. SCHMID, *Clerk*.

United States Court of Appeals for the Ninth Circuit

No. 17,678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

Jan. 22, 1963

Before: CHAMBERS and JERTBERG, *Circuit Judges*, and CLARK, *District Judge*.

On November 26, 1962, this Court filed its opinion remanding the above cause to the board for further proceedings consistent with the views expressed therein.

The National Labor Relations Board has moved this Court to amend its opinion so that the Board on remand may determine whether the handbilling constituted a threat, restraint, or a coercion within the meaning of § 8(b)(4)(ii) of the Act, or was constitutionally protected free speech.

Neither of these defenses to the Union's illegal activities was raised or discussed by the Board in the prior proceedings nor urged or raised before this Court in the briefs or arguments.

The Board's reliance upon *Great Western Broadcasting Corp.* v. *N.L.R.B.*, No. 17698, filed November 9, 1962 (9th Cir.) is misplaced. In *Great Western*

the labor unions intervened in the proceedings and raised the restraint, coercion and constitutional questions. The first intimation of such grounds in the instant case was raised on the motion for clarification.

The motion of the Board is denied. See *Partenweederei, MS Belgrano, and Rudolph A. Oetker* v. *George Weigel,* No. 17178, filed December 11, 1962 (9th Cir.). See National Labor Relations Act, as Amended, 29 U.S.C. § 160(e): "No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

(Endorsed) Order Filed Jan. 22, 1963.

FRANK H. SCHMID, *Clerk.*

United States Court of Appeals for the Ninth Circuit

No. 17678

SERVETTE, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE

Before: CHAMBERS and JERTBERG, *Circuit Judges*, and CLARK, *District Judge*

THIS CAUSE came on to be heard upon the petition of Servette, Inc., filed December 14, 1961 to review an order of the NLRB issued by it on October 30, 1961 and

The Court heard arguments of respective counsel on July 12, 1962 and has considered the briefs and transcript of record filed in this Cause. On November 26, 1962, the Court being fully advised in the premises, handed down its decision, in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the Board's decision, findings and order are and each of them is set aside and that this cause be and hereby is remanded to the said National Labor Relations Board for further proceedings consistent with the view expressed in the opinion of this Court.

(ENDORSED) filed November 26, 1962.

FRANK H. SCHMID, *Clerk*.

A true copy.

Attest: February 21, 1963,

FRANK H. SCHMID, *Clerk*.

United States Court of Appeals for the Ninth Circuit

No. 17,698

GREAT WESTERN BROADCASTING CORPORATION, D/B/A KXTV, PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD, RESPONDENT, AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL, AND NATIONAL ASSOCIATION OF BROADCAST EMPLOYERS AND TECHNICIANS, LOCAL 55, INTERVENORS

Nov. 9, 1962

On Petition for Review of an Order of the National Labor Relations Board

Before: BARNES, HAMLEY, and JERTBERG, *Circuit Judges*

HAMLEY, *Circuit Judge:*

This is a proceeding to review an order of the National Labor Relations Board dismissing an unfair labor practice complaint. The case involves an attempt by two unions, assertedly using coercive methods, to force several companies to cease advertising on a television station with which the unions were having a labor dispute. It was charged that the union activity was proscribed by section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (Act), 29 U.S.C., § 158(b)(4)(ii)(B).

The charging party, and petitioner here, is Great Western Broadcasting Corporation, which operates television station KXTV in Sacramento, California. The unions, which were respondents in the Board proceedings and are intervenors here, are American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

The facts are not in dispute. A primary labor dispute between the unions and KXTV resulted in a strike which commenced on September 26, 1960. Picketing of the KXTV premises ensued. Among the advertisers who then regularly used the services and facilities of KXTV for advertising purposes were John Geer Chevrolet Company (Geer), Capitol Studebaker Company (Capitol), Rainbo Baking Company (Rainbo), Shell Oil Company (Shell), Burgermeister Brewing Corporation (Burgermeister), and Handy-Andy. Each of these advertisers is an employer engaged in commerce or in an industry affecting commerce within the meaning of the Act.

In an effort to win their labor dispute with KXTV, the unions took the following action:

> (1) had committees of the unions call upon all of the advertisers who used KXTV for the purpose of requesting them to discontinue their patronage of the station and assist the unions in their cause against KXTV;
>
> (2) had a committee call upon Capitol for the same purpose, in the course of which this advertiser was told that if it continued to advertise on KXTV the Labor Council would undoubtedly print the name of Capitol in the Labor Bulletin as not supporting the strike;
>
> (3) mailed to all KXTV advertisers a letter setting forth the background of the strike and

requesting discontinuance of advertising over the station, warning that failure to do so would bring an adverse economic reaction;[1]

(4) printed and distributed four thousand handbills listing KXTV as "unfair", and naming Geer, Rainbo, Shell and Burgemeister as advertisers who nevertheless continued to utilize the services of the station, such distribution being made in front of KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores which handled Rainbo bread and Burgermeister beer;[2]

(5) sent a letter to the San Francisco Labor Council asking the Council to return its Shell credit card to that company and to request the members of affiliated unions to do likewise;

(6) sent a later letter to the San Francisco Labor Council listing fourteen companies who were then advertising on station KXTV, with the

---

[1] This letter contained these statements:

"* * * Any advertiser on this station while it is being operated by strike breakers will give the impression of taking sides in this dispute.* * *

"* * * We are about to launch an intensive campaign to bring the facts behind this dispute to the attention of the entire population covered by this station. We are sure you recognize the obvious fact that many members of organized labor and their families, and those sympathetic to the cause of organized labor, will have long-lasting resentment against any product or sponsor who takes sides in this dispute by advertising on this station during the course of this worthy strike.

"If you are currently advertising for clients on this station, or have any advertising projected for the next six months, we are sure you will wish to change your plans to avoid the inevitable adverse reaction. * * *"

[2] Copies of this leaflet were also found stuffed between loaves of bread at a supermarket supplied by Rainbo. The leaflet carried this note:

"This statement is directed to the customers of the above advertisers. It is not a request to employees to refuse to pick up, deliver or transport, or to refuse to perform any service."

observation that "any aid" the Council and its affiliated members "can give in this sponsor area" would be appreciated;

(7) showed to the President of Handy-Andy, with an appeal to stop advertising on KXTV, a copy of a newly-printed leaflet which gave the background of the labor dispute with KXTV, named Handy-Andy as a company which continued to do business with KXTV, and added the comment: "We think you will agree that this continued association is contrary to the best interests of working people and the public";[3]

(8) telephoned the general manager of Geer and, in conjunction with an appeal to have Geer cease advertising on KXTV, informed him that a new leaflet was being printed naming Geer as a sponsor still advertising on KXTV and that if Geer continued to do business with the station, this leaflet would be passed out in front of Geer's establishment, among other places.

As a result of the described union activity one KXTV advertiser was subjected to a secondary boycott and at least two other advertisers ceased doing business with that station.[4]

There was no picketing, or threat to picket, the place of business of any of the advertisers. There was

[3] One thousand of these leaflets were printed, and a like number of ten similar leaflets were printed, each naming a different company which continued to advertise on KXTV. None of these leaflets, however, were distributed.

[4] As a result of the first letter sent by the unions to the San Francisco Labor Council, Shell received numerous letters enclosing Shell credit cards. The individual writers explained that they would pick up their cards in the future when Shell discontinued its advertising over KXTV.

On October 10, 1960 Capitol cancelled its $8,500 advertising contract with KXTV for the duration of the strike. In a letter of explanation, Capitol told KXTV that after its televised commercial one evening, the company's phones were "jammed" from 7:00 to 9:30 P.M. by callers claiming to be union people. These callers criticized Capitol for not supporting the strike and, in sub-

no physical violence or threat of physical violence. The handbills were truthful and their distribution was peaceful. None of the described union activity was designed to bring about a work stoppage by employees of any advertiser, and none had that effect.

On these facts the Board, with one member dissenting, held that the described union activity was protected by the publicity proviso at the end of section 8(b)(4) of the Act.[5] The complaint was therefore dismissed in its entirety.[6]

---

stance, said that for this reason they would not do business with the company.

On November 10, 1960, and as a result of the pressure described above, Rainbo cancelled a $26,000 advertising contract which it had entered into with KXTV a month previously.

[5] Section 8(b)(4) provides in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, * * *

* * * * *

"*Provided further*, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his em-

(See footnote 6 on next page)

Petitioner here challenges the Board conclusion that the publicity proviso is applicable under the facts of this case. It contends that since that proviso pertains only to publicity concerning a "product" or "products" which are "produced" by a primary employer and which are thereafter "distributed" by another employer, the service rendered by a television station is not included therein.[7]

The Board, as respondent on this review, joins issue on this point. The two unions, which were respondents in the agency proceeding and are intervenors here, support the Board's position that the publicity proviso is applicable and protects the union activity in question.

In determining which of these conflicting constructions of the proviso is correct, the critical statutory words, none of which are defined in the Act, are "product," "produced," and "distributed."

In its broadest sense, the term "product" denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise permits, to refer to a completed service as a "product".

In this case, however, as all seem to recognize, the context in which the term "product" appears in the proviso precludes the view that the television service rendered by KXTV, considered alone, is a "product"

---

ployment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; * * *"

[6] A preliminary injunction against the unions which the Board had obtained, reported *sub nom. Brown* v. *American Federation of Television & Radio Artists, San Francisco Local*, N.D. Cal., 191 F. Supp. 676, was thereafter dismissed.

[7] In support of the same proposition, the National Association of Broadcasters has filed an *amicus curiae* brief in this court.

within the meaning of the proviso.[8] One reason for this conclusion is the fact that in two other places in section 8(b)(4), the term "services" is used in contradistinction to tangible articles.[9] It is likely that Congress would have followed this same format if it had intended the publicity proviso to apply with regard to a primary employer who renders services instead of manufactures tangible articles.

A second and still more persuasive reason why television advertising service, considered alone, could not be a "product" within the meaning of the publicity proviso lies in the fact that the only "products" there referred to are those which are capable of being "distributed" by "another employer." An advertising service rendered by a television station is not capable of being so "distributed," least of all by an employer

[8] In holding that the "privilege" which a television network sells to a sponsor is not a "commodity" within the meaning of sections 2(a) and 3 of the Clayton Act, 15 U.S.C., sections 13(a), 14 it has been held that the most reliable guide to the meaning of the word is the context in which it is employed. *Columbia Broadcasting System v. Amana Refrigeration, Inc.*, 7 Cir., 295 F. 2d 375, 378.

[9] In section 8(b)(4)(i), the following words are used: "* * * to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities *or to perform any services;* * * *" [Emphasis supplied.] Near the end of the publicity proviso itself, the following language appears: "* * * to refuse to pick up, deliver, or transport any goods, *or not to perform any services,* * * *" [Emphasis supplied.] In section 8(b)(4)(i)(ii)(B), while the word "services" is not used, the following language indicates the same differentiation between a primary employer who produces, processes or manufactures a tangible article, and one who does not: "* * * to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, *or to cease doing business with any other person,* * * *" [Emphasis added.]

whose only relationship with the station is that of an advertiser.

The Board, however, believes that it has overcome this difficulty by holding that it is not the television service of KXTV, standing alone, which is the "product" here, but the item being advertised on that station. KXTV becomes one of the "producers" of the items advertised, the Board reasons, "by adding its labor in the form of capital, enterprise and service * * *" to such items.

It may be noted, however, even before testing the correctness of this line of reasoning, that it leads to the rather remarkable conclusion that a television station can be a producer of automobiles, bread, gasoline and beer.[10]

In reaching its conclusion the Board followed its decision rendered on October 31, 1961, in *Middle South Broadcasting Co.*, 133 NLRB No. 1698. The primary employer in that case was a radio broadcasting station. In turn, the decision in *Middle South Broadcasting* was based upon the Board's decision rendered on August 10, 1961 in *International Brotherhood of Teamsters, etc.* (*Lohman Sales Company*) 132 NLRB 901. There the primary employer was a wholesale distributor of cigarettes, cigars, other tobacco products, candy, and related products. The issue was whether a wholesale distributor is a producer of products within the meaning of the proviso.

In the *Lohman* case the Board first determined that, so far as human effort is concerned, labor is the prime

[10] It also requires one to regard the advertisers of those products, who either manufacture the articles themselves or distribute articles manufactured by companies having no connection with the television station, as the "distributors" of articles "produced" by a television station.

requisite of one who produces."[11] The Board then reasoned that not only the actual manufacturer, but also the wholesaler, adds "labor in the form of capital, enterprise, and service to the product he furnishes the retailers." "In this sense, therefore," the Board stated, "Lohman, as the other employers who 'handled' the raw materials of the product before him, is one of the producers of the cigarettes distributed by his customers. * * *"

In the Board's contemplation then, the "production" of cigarettes includes every phase of activity, beginning with the combination of tobacco seed, earth and water, and ending with the ready availability of cigarettes to the smoking public. Each employer in the process of production begins with what, to him, are raw materials, and "produces" what to him is a finished "product." The wholesale distributor (or in our case the television station) "handles" cigarettes which are not yet readily available to the members of the smoking public in the same sense as the manufacturer "handles" raw tobacco which has not yet become

[11] In reaching this conclusion the Board relied upon dictionary definitions, primarily upon a definition of "product" to be found in A. Merriam Webster, Webster's New Collegiate Dictionary, 1959, and an explanation of the term "production" contained in Black's Law Dictionary, Fourth Edition, West Publishing Co., 1951, pages 374–375. The latter definition is as follows:

"In political economy. The creation of objects which constitute wealth. The requisites of production are labor, capital, and the materials and motive forces afforded by nature. Of these, labor and the raw materials of the globe are primary and indispensable. Natural motive powers may be called in to the assistance of labor and are a help, but not an essential, of production. The remaining requisite, capital, is itself the product of labor. Its instrumentality in production is therefore, in reality, that of labor in an indirect shape. Mill, Political Economy; Wharton."

cigarettes. In this sense the wholesale distributor and the television station are producers of products capable of being distributed by their successors in the production process.

As we have indicated earlier in this opinion, the terms "product," "produce" and "production" may be construed this broadly if they are not found in a more restrictive context. But, as we have also indicated earlier, the context in which the words "produce" and "product" are found indicates that in using them Congress was referring to one kind of economic activity and its result rather than to all economic activity and its result.

The Board proceeds on the assumption that Congress intended "product" to encompass the results of all forms of economically productive labor. Yet it concedes that a television station's product is not advertising but the subject of the advertising. So long as the subject of the advertising is a tangible article these propositions need not lead to an incongruous result.

But if, instead of a tangible article, the subject of the television advertising is a service, such as banking or cleaning, an internal inconsistency at once appears.[12] It derives from the fact that while television advertising service, as such, is not to be regarded as a "product" under the proviso, because it is not capable of being distributed, a service being advertised on television is to be regarded as a "product," although it is equally incapable of being distributed.

Thus, while the Board adopts a broad construction of

[12] There is evidence in the case before us that the unions directed informational activity against one bank and one dry cleaning establishment. Since neither the bank nor the cleaners was found to be engaged in commerce or an industry affecting commerce, however, the union's activity with respect to them is not in issue here.

the term "product" in order to obviate the incongruity of saying that a television advertising service is capable of being distributed, we find that, after all, the underlying difficulty has not been avoided. The Board is still saying that a service, though one being advertised rather than the television service itself, is a "product," although not capable of being distributed.

Only now the Board has involved itself in the additional difficulty of saying that a television station is a "producer" of banking and cleaning services which are "distributed" by banks and cleaners. If the capacity for distribution requirement is to be ignored it might as well be at the outset, with reference to television advertising service, thereby avoiding the futile involvements inherent in the Board's broad construction.

The Board expressed the view in *Lohman* that unless its concept were accepted, it must follow that "vast numbers of our working population produce nothing."[13] The weakness of this argument lies in the assumption that if, for the purposes of the proviso, the term "product" must be limited to a tangible article, it must follow that even in a broad economic sense, only those engaged in manufacturing tangible articles are "producers."

The two frames of reference should not be confused. For the limited purposes of the proviso only those who deal with tangible articles are "producers," but in general economic theory, all who engage in useful labor, whether or not directly related to tangible articles, are

[13] Developing this idea, the Board said in *Lohman*:

"• • • Their thought, labor, or business enterprise is not a 'product.' We do not believe that the plain meaning of the words 'product' and 'produced' requires the Board to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled."

"producers." In order to hold that a television station is not, within the meaning of the proviso, the producer of automobiles which it advertises, it is not necessary to conclude that the engineers, announcers, advertising men and others employed by the station are not "productive." They perform a television advertising service, just as the employees of Lohman perform a distribution service. But since the fruit of their labor is not capable of physical distribution by others, it is not a "product" as that term is used in the proviso.

The Board believes that the legislative history indicates that the result reached in *Lohman, Middle South Broadcasting*, and this case, is what Congress really intended.

We very much doubt that the statutory language of the publicity proviso is ambiguous with regard to the meaning of "produced," thereby warranting reference to legislative history. While this term is not defined in the Act, the context indicates to us that, in the proviso, Congress was referring to the activity of a primary employer in applying capital, labor and enterprise to effect the conversion of raw materials in his possession into a more finished tangible article.

In section 8(b)(4)(i)(ii)(B), which contains the only statutory reference to the kind of employers who can be the creators of "products," as that term is used in the Act, the words used are: "* * * the products of any other producer, processor, or manufacturer * * *"[14] The words "processor" and "manufacturer" refer to persons engaged in a physical creative activity, and it is reasonable to believe that the word "producer" was used in the same sense. There is no reason to believe that "produced" was used in the proviso in any different sense than "producer" was used in section 8(b)(4)(i)(ii)(B).

[14] The pertinent part of section 8 (b)(4) is quoted in note 5.

But, assuming that resort to legislative history is appropriate, we believe it to be inconclusive as to the point under discussion.

It is true that this history indicates that some Senators and Congressmen expressed the view that inclusion of the publicity proviso was necessary because without it, section 8(b)(4)(ii)(B) might outlaw forms of publicity such as leaflets, radio broadcasts, and newspaper advertisements, thereby impinging upon free speech.[15] The Board argues, in effect, that there is no reason to believe that Congress was less interested in preserving free speech where the primary employer is a distributor, or a radio or television operator, than when he is a manufacturer of tangible articles.

If all that Congress really had in mind in adding the publicity proviso was to implement, with respect to leaflets, broadcasting and newspapers, the free speech guarantee of the First Amendment, the proviso was not needed and would have to be regarded as surplusage. Section 8(c) of the Act, 29 U.S.C. § 158(c), already in effect, provided complete implementation of

[15] When the proposed 1959 amendment of section 8(b)(4) got to conference without such a proviso, Senator Kennedy and Representative Thompson expressed this concern. (105 Cong. Rec. 16591; II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [Leg. Hist.] 1708). The proviso was thereafter added as a "clarification." (105 Cong. Rec. 18022; II Leg. Hist. 1712). In discussing the addition of this proviso, Senator Kennedy explained that, without the proviso, the amendment of section 8(b)(4) would have prohibited "the handing out of handbills or even taking out an advertisement in a newspaper." (105 Cong. Rec. 17720, 17898-17899; II Leg. Hist. 1388-1389, 1432). Senator Douglas and Representative Udall similarly expressed the view that the proviso was necessary to protect free speech. (105 Cong. Rec. 19904, 18135; II Leg. Hist. 1834, 1722).

the First Amendment in this regard.[16] As intervenors in this case concede, section 8(c) is "no more than a restatement of the principle embodied in the First Amendment," quoting *NLRB* v. *La Salle Steel Co.*, 7 Cir., 178 F. 2d 829, 835.

Section 8(c), however, does not protect, under the guise of free speech, publicity activity which is associated with coercion, since that subsection ends with the words, "* * * if such expression contains no threat of reprisal or force or promise of benefit." Thus if Congress desired to protect any kind of publicity which was associated with coercion, it was necessary to add statutory language which did not contain the limitations built into section 8(c). Apparently Congress did want to protect some publicity of this kind, and so solved the problem by adding the publicity proviso.[17]

---

[16] Section 8(c) reads:

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefits."

[17] The Board has itself held, in *Lohman, Middle South Broadcasting Co.* and the case now before us, that the publicity proviso excepts certain publicity although coercion may be involved. The statutory authority for this is to be found in section 8(b)(4)(ii), quoted in note 5.

The Board said in *Lohman*, at page 904:

"* * * While such conduct otherwise might constitute restraint and coercion, we agree with the conclusion of the Trial Examiner that Respondent's hand-billing in this case was protected by the proviso to Section 8(b)(4)."

The Board reached a similar conclusion in its *Middle South Broadcasting Co.* decision, saying, at page 1705:

"* * * We also agree with his [Trial Examiner's] finding that, unless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patron-

This demonstrates, we think, that the meaning of "produced," as used in the publicity proviso, is not to be given an all-inclusive construction on the theory that Congress was trying to guarantee free speech. On the contrary, it suggests that since the publicity being protected by the proviso could be of a kind associated with threats, coercion, or restraint, Congress did not intend an expansive exception but chose words which would have limited application.

Had Congress intended to except publicity concerning primary employers whose own products were of an intangible nature not capable of "distribution," the proviso could have been much simpler than that which was enacted. It would have been sufficient to say that nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, "for the purpose of truthfully advising the public (including consumers) that *an establishment is operated*, or goods are produced or distributed, by an employer engaged in a labor dispute. * * *" [Emphasis supplied.]

In fact these identical words were proposed in a Senate Resolution, instructing the Senate conferees on S. 1555, offered in the Senate on August 28, 1959, by Senators Kennedy, McNamara, Morse and Randolph.[18] This resolution was not adopted.

Unlike the language proposed in the resolution which was not adopted, the statutory proviso does not

---

ize' leaflets urging a consumer boycott of secondary employers still advertising on WOGA, would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that section."

In the case now before us the Board, in its decision, makes reference, with approval, to its holding in *Lohman* that publicity activity may be protected by the publicity proviso, although such activity "might constitute restraint and coercion. * * *"

[18] II Leg. Hist. 1383.

include, among designated primary employers, those who "operated" establishments or "distributed" goods. The only primary employers referred to in the enacted proviso are those who produce a product or products. This class of employers is further defined and restricted by the additional provision that the employer must be one who produces products capable of distribution.

It seems unlikely that an easy way of expanding the coverage of the proviso would have been rejected and detailed limiting provisions (which under the Board's reasoning become surplusage) would have been developed, if it had been intended that the proviso was to have the broad coverage given to it by the agency.[19]

The foregoing considerations lead us to conclude that the publicity proviso which is a part of section 8(b)(4)(B) does not protect publicity to the effect that television service is rendered by a station with whom the labor organization has a primary dispute, which service is being utilized by other employers.

Intervenors argue, however, that even if the publicity proviso is inapplicable there are two other reasons why the Board order should be sustained. These are: (1) Section 8(b)(4)(ii)(B) relates only to union activity which tends to "threaten, coerce, or restrain," and the activity here in question was not of that kind; and (2) the union activity involved in this case is

[19] We do not, however, agree with petitioner that significance is to be attached to the fact that, during the Congressional debates, the proviso as it was finally enacted was referred to only as one which would permit publicity concerning "goods" or "products." A close reading of the legislative history leads us to believe that reference to "goods" and "products" produced by non-union or struck "manufacturers" served only as an exemplification of the typical secondary boycott situation rather than as a conscious expression of Congressional purpose.

protected by the free speech and free press provisions of the First Amendment to the Federal Constitution.

The Board relied on neither of these grounds in entering its order here under review. With regard to the "coercion" argument, a determination is complicated by the fact that eight separate and distinct union actions are drawn into question. Some may be coercive and some may not.

In our view, the Board should make a determination as to the merits of these two additional arguments advanced by intervenors before this court is called upon to consider them.

The Board order under review is reversed and the cause is remanded to that agency for consideration, on the present record, with such augmentation thereof, if any, as it may deem appropriate, of the additional questions raised by intervenors, as noted above.

(Endorsed) Opinion Filed Nov. 9, 1962.

FRANK H. SCHMID, *Clerk.*

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the

domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing

in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * * *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1941

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	6
C. The decision of the court of appeals	7
Summary of argument	8
Argument:	
I. The appeals to the store managers to cease dealing with Servette did not violate Section 8(b)(4)(i)(B) of the Act	11
A. The words of Section 8(b)(4)(i)(B) do not reach a mere request that a customer cease dealing with an employer that the union considers unfair	11
B. The legislative history of Section 8(b)(4)(i) shows that it was intended to reach only refusals to perform work for a secondary employer intended to force him to cease dealing with the primary employer	14
C. Section 8(b)(4)(ii) also shows that Section 8(b)(4)(i) was not intended to bar the inducement of the authorized managerial personnel of a neutral employer to exercise their delegated authority to cease dealing with a primary employer	20
II. The union's handbilling at the retail stores did not violate Section 8(b)(4)(ii)(B) of the Act	26
Conclusion	36
Appendix	37

706-439—63——1

CITATIONS

Cases:

	Page
A. H. Phillips, Inc. v. *Walling*, 324 U.S. 490	29
Alliance Auto Service, Inc. v. *Cohen*, 341 Pa. 283, 19 A 2d 152	33
Alpert v. *Excavating & Building Material Chauffeurs, Local 379*, 184 F. Supp. 558	25
Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Peyton Packing Company, Inc.), 131 NLRB 406	24
Arkansas Express, Inc., 92 NLRB 255	16
Auburn Draying Co. v. *Wardell*, 227 NLY. 1, 124 N.E. 9	33
Bossert v. *Dhuy*, 221 N.Y. 342, 117 N.E. 582	33
Carolina Lumber Co., 130 NLRB 1438	24
Conway's Express, 87 NLRB 972, affirmed, 195 F. 2d 906	16
Di Giorgio Fruit Corp., 87 NLRB 720, enforced, 191 F. 2d 642, certiorari denied, 342 U.S. 869	16
Duplex Printing Co. v. *Deering*, 254 U.S. 443	12
Excavating and Building Material Chauffeurs and Helpers Local Union No. 379 (Consalco Trucking, Inc.), 132 NLRB 827	25
Ferro-Co Corp., 102 NLRB 1660	16
Fortenbury v. *Superior Court*, 106 P. 2d 411	33
Goldfinger v. *Feintuch*, 276 N.Y. 231, 11 N.E. 2d 910	33
Great Northern Railway Co., 122 NLRB 1403, enforcement denied, 272 F. 2d 741	16
Great Western Broadcasting Corp. (KXTV), 134 NLRB 1617, reversed and remanded, 310 F. 2d 591	29
Great Western Broadcasting Corp. v. *National Labor Relations Board*, 310 F. 2d 591	28, 34, 35
International Brotherhood of Teamsters, etc., and Dairy Employees Local 537 (Lohman Sales Company), 132 NLRB 901	6, 25, 27
International Rice Milling Co., Inc., 84 NLRB 360, enforcement denied, 183 F. 2d 21, reversed, 341 U.S. 665	16
Joliet Contractors Ass'n v. *National Labor Relations Board*, 202 F. 2d 606, certiorari dened, 346 U.S. 824	17

Cases—Continued

	Page
Local 294, International Brotherhood of Teamsters, etc. (Van Transport Lines, Inc.), 131 NLRB 242	24
Local 324, International Union of Operating Engineers (Brewer's City Coal Dock), 131 NLRB 228	25
Local 1976, Carpenters v. *National Labor Relations Board*, 357 U.S. 93	15
Local Lodge No. 1424, Machinists v. *National Labor Relations Board*, 362 U.S. 411	34
Local No. 505, International Brotherhood of Teamsters, etc. (Carolina Lumber Co.), 130 NLRB 1438	6, 24
McComb v. *Blue Star Auto Stores*, 164 F. 2d 329	29
McComb v. *Wyandotte Furniture Co.*, 169 F. 2d 766	29
Middle South Broadcasting Co., 133 NLRB 1698	29
Mitchell v. *Pidcock*, 299 F. 2d 281	29
National Labor Relations Board v. *Business Machine & Office Appliance Mechanics Conference Board*, 228 F. 2d 553, certiorari denied, 351 U.S. 962	15
National Labor Relations Board v. *International Rice Milling Co.*, 341 U.S. 665	17
National Labor Relations Board v. *International Union of Brewery Workers*, 272 F. 2d 817	15
National Labor Relations Board v. *Local 294, Teamsters (Van Transport Lines)*, 298 F. 2d 105	25
Paper Makers Importing Co., Inc., 116 NLRB 267	16
Rabouin v. *National Labor Relations Board*, 195 F. 2d 906	15
Sealright Pacific, Ltd., 82 NLRB 271	15
Sheet Metal Workers International Association, Local Union No. 299 (S. M. Kisner and Sons), 131 NLRB 1196	25
Teamsters, Chauffeurs, Warehousemen & Helpers, Local 901 (Editorial "El Imparcial," Inc.), 134 NLRB 895	25
Upholsterers Frame & Bedding Workers Twin City Local No. 61 (Minneapolis House Furnishing Co.), 132 NLRB 40	25
United Plant Guard Workers (Houston Armored Car Co.), 136 NLRB 110	29
United States v. *Montgomery Ward & Co.*, 150 F. 2d 369	29

Cases—Continued

	Page
United Wholesale & Warehouse Employees, Local 261 v. *National Labor Relations Board*, 282 F. 2d 824	15
Walling v. *Friend*, 156 F. 2d 429	29
Walling v. *Mutual Wholesale Food Co.*, 141 F. 2d 331	29
Warehouse Employees Union, Local 730 (C. R. Shaeffer and Sons), 136 NLRB 968	25
W. T. Smith Lumber Co., 116 NLRB 1756, enforcement denied, 246 F. 2d 129	16

Statutes:

Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 203(j)	29
National Labor Relations Act, as amended in 1959 (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151 *et seq.*):	
Section 2	16, 37
Section 2(2)	16
Section 2(3)	16
Section 8(b)	27, 38
Section 8(b)(4)	26, 34
Section 8(b)(4)(i)	19, 20, 21, 24, 25, 26, 38
Section 8(b)(4)(ii)	20, 21, 23, 24, 26, 30
Section 8(b)(4)(ii)(B)	26, 38
National Labor Relations Act, as it existed prior to the 1959 Amendments (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*):	
Section 8(b)(4)(A)	15, 16, 17, 19, 20, 22, 39
50 U.S.C. App. (1946 ed.) 1503	30

Miscellaneous:

105 Cong. Rec. 14347, II Leg. Hist. 1522–1523	18
105 Cong. Rec. 15532, II Leg. Hist. 1568	18
105 Cong. Rec. 16591, II Leg. Hist. 1708	30
105 Cong. Rec. 17333, II Leg. Hist. 1383	35
105 Cong. Rec. 17720, II Leg. Hist. 1388–1389	30
105 Cong. Rec. 17881–17882, 18022, 19771, II Leg. Hist. 1425–1426, 1712, 1857	19, 24
105 Cong. Rec. 17882–17883, II Leg. Hist. 1426–1427	33
105 Cong. Rec. 17898, 17899, II Leg. Hist. 1431, 1432	19
105 Cong. Rec. 18133, II Leg. Hist. 1720	31
105 Cong. Rec. 19849, II Leg. Hist. 1823	24, 32
Gregory, *Labor and the Law* (1961 ed.), pp. 132–153	33

Miscellaneous—Continued
Hearings before Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 86th Cong., 1st Sess., S. 505, et al., pp. 265, 304–305 ..... Page 17, 22
H.R. 8400, Sec. 705(a), I Leg. Hist. 680 18
S. 748, I Leg. Hist. Labor-Management Reporting and Disclosure Act of 1959 (G.P.O., 1959), Sec. 503(a) 17
S. 1555, Sec. 707(a), I Leg. Hist. 582 17
S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 80, I Leg. Hist. 476 17
Teller, *Labor Disputes and Collective Bargaining* (1940), Vol. I, Sec. 123 33



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 111

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SERVETTE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 85–98), is reported at 310 F. 2d 659. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 36–40, 18–29) are reported at 133 NLRB 1501.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1962 (R. 98–99). A motion for clarification of opinion, filed by the Board, was denied on January 22, 1963 (R. 105). On February 21, 1963, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including April 25, 1963 (R. 106). The petition for a writ of certiorari was filed on April 25, 1963, and was granted on June

10, 1963 (R. 106; 374 U.S. 805).[1] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether Section 8(b)(4)(i) of the National Labor Relations Act prohibits a labor union from asking the managers of retail stores, who are authorized to select the sources of goods bought for resale, to cease to patronize a supplier which the union considers unfair.

2. Whether Section 8(b)(4)(ii) of the National Labor Relations Act prohibits a labor union from passing out handbills outside a retail store calling attention to the fact that the store carries products of a wholesaler which the union considers unfair, and asking the public not to purchase such products.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 37–39.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Servette is a wholesale distributor of specialty merchandise such as candy, liquor, etc., in the Los Angeles area (R. 18; 4). Kory's Markets, Inc., McDaniels

[1] The case was set for oral argument immediately following *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, No. 88, this Term (R. 106).

Markets, and Daylight Markets (herein referred to respectively as Kory, McDaniels and Daylight) separately operate supermarket chains selling food in that area (R. 18–19; 71). Kory, McDaniels, and Daylight regularly purchase, handle, stock and sell products distributed by Servette (R. 18–19; 56, 59–60, 61–65, 67–71).

In early February 1960, as a result of a labor dispute with Servette, the Union struck and picketed Servette's warehouse in Los Angeles (R. 19; 74–75). From February 3 through March 10, 1960, in furtherance of its strike against Servette, the Union sought, by the means set forth below, to induce various stores operated by McDaniels, Daylight, and Kory to cease doing business with Servette.

1. MCDANIELS MARKETS

(a) Union agents told the manager of McDaniels Market No. 14 that they had a labor dispute with Servette and "asked [him] to cooperate with them by not dealing with Servette and by taking Servette merchandise off [the] shelves" (R. 19; 55–56). They told him that if he failed to cooperate they would pass out handbills to customers (R. 19–20; 55–57). Handbills were passed out but the manager continued his purchases from Servette (*ibid.*). The handbills passed out at this market, as well as at the other markets, read as follows (R. 20; 84, 54–55).

TO THE PATRONS OF THIS STORE

WHOLESALE DELIVERY DRIVERS & SALESMEN'S LOCAL NO. 848 urgently requests that you do not buy the following products distributed by SERVETTE, INC.:

* BRACH'S CANDY
* SERVETTE CANDY
* GOOD SEASON SALAD DRESSING
* OLD LONDON PRODUCTS

The SERVETTE COMPANY which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts. These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of SERVETTE appreciate your cooperation in this fight.

(b) Union agents asked the manager of McDaniels Market No. 18 to remove merchandise distributed by Servette from his shelves (R. 20; 63–64). At a meeting of McDaniels' managers, they were told by higher officials to use their best judgment in the matter and to do as they thought wise (R. 20; 63). The manager of McDaniels Market No. 18 either diminished his purchases from or ceased doing business with Servette (*ibid.*).

(c) The manager of McDaniels Market No. 25 was requested by the Union not to handle Servette merchandise and was shown a copy of the handbill, but

he was not told that the handbill would be distributed (R. 21; 63–64). He either diminished or terminated his business with Servette (*ibid.*).

2. DAYLIGHT MARKETS

Union agents asked the manager of Daylight Market No. 3 to cooperate with them in their dispute with Servette by not handling Servette products, and told him that they were passing out handbills to the customers of those markets which refused cooperation (R. 21; 57–58). No handbilling occurred (*ibid.*).

3. KORY'S MARKETS

(a) Union agents showed a copy of the handbill to the manager of Kory's Market No. 6 and told him that the handbills would be passed out to his customers unless Kory ceased doing business with Servette (R. 21; 69–71). When the manager said he would have to check with the main office, the Union agents passed out handbills to customers (*ibid.*). The next week the manager refused to let Servette stock his shelves (R. 21; 20). On two subsequent occasions Union agents visited the market to ascertain whether or not Servette merchandise was on display (R. 21; 61).

(b) Union agents passed out handbills at Kory's Market No. 5 (R. 21–22; 61–63). When the manager asked the men why they were handbilling, they thereupon ceased handbilling and departed without asking him to cease handling Servette products (R. 22; 61).

(c) Union agents asked the manager of Kory's Market No. 1 if he would cooperate by removing

Servette products from his shelves. Handbills were distributed on two different occasions (R. 22; 64–66).

(d) Union agents passed out handbills to the customers of Kory's Market No. 2 and told the manager that they would stop handbilling if he would cease handling Servette products (R. 22; 66–67).

(e) Handbills were distributed at Kory's Market No. 3 (R. 22; 69–70).[2]

B. THE BOARD'S CONCLUSIONS AND ORDER

Relying upon its decision in *Local Union No. 505, IBT (Carolina Lumber Co.)*, 130 NLRB 1438, the Board concluded that the Union's appeal to the various store managers did not violate Section 8(b)(4)(i)(B) of the Act (R. 37–38). In *Carolina Lumber*, the Board had held that Section 8(b)(4)(i) does not prohibit appeals directed to individuals high enough in the managerial hierarchy to control business relations with the primary employer, but only inducements directed to individuals, such as rank-and-file workers and low level supervisors, who merely have power, through work stoppages and related conduct, to put pressure on those higher in the enterprise.

The Board (with Member Rodgers dissenting) further concluded, on the authority of its holding in *International Brotherhood of Teamsters, Local 537*

[2] Jerry Finley, the Union's business agent, testified that in the course of its program against Servette the Union distributed the handbill described above to "well over 50" retail chain supermarkets in the greater Los Angeles area, and that the evidence here with respect to McDaniels, Daylight and Kory covered only 3 of the chains where customer handbilling occurred (R. 54–55, 76–78).

(*Lohman Sales Company*), 132 NLRB 901, that the Union's handbilling at the various stores doing business with Servette was protected by the "publicity" proviso and thus did not violate Section 8(b)(4)(ii)(B) of the Act (R. 38–40). In *Lohman*, the Board had held that the publicity proviso to Section 8(b)(4) was not limited to a situation where the union's primary dispute was with a manufacturer of products, but also applied where the primary employer was engaged in other forms of business such as distribution. The Board accordingly dismissed the complaint (R. 38).

C. THE DECISION OF THE COURT OF APPEALS

The court below held that Section 8(b)(4)(i) encompasses appeals directed to any supervisory personnel, and that the Union's inducement of the store managers violated that section (R. 85–97). The court held further that the Union's handbilling was not protected by the "publicity" proviso to Section 8(b)(4) because Servette was a distributor. The court followed its decision in *Great Western Broadcasting Corporation* v. *National Labor Relations Board*, 310 F. 2d 591, in which it held that the proviso applied only where the primary employer was a manufacturer of a physical product (R. 98). The court therefore set aside the Board's order and remanded the case for further proceedings consistent with its opinion (R. 98).

SUMMARY OF ARGUMENT

I

A. Section 8(b)(4)(i)(B) of the National Labor Relations Act, as amended in 1959, makes it an unfair labor practice for a labor organization to induce or encourage "any individual employed by any person" to engage in "a strike or a refusal in the course of his employment to use, * * * or otherwise handle * * * any goods * * * or to perform any services," with an object of "forcing" that person to cease doing business with any other person. It is apparent on its face that Section 8(b)(4)(i) deals only with a union's appeal to one or more individuals who work for Firm A to refuse to perform employment services in order to force Firm A to stop doing business with Firm B, with which the union is engaged in controversy. That provision leaves the union entirely free to ask Firm A—and, where Firm A is a corporation, the employees of that firm who are vested with authority to make the management decision—to break off business relations with Firm B so long as the labor dispute continues.

Section 8(b)(4)(i), therefore, does not apply in this case. The store managers, the highest managerial officials in each store, "were authorized to decide as they best could whether to continue doing business with Servette in the face of the threatened or actual handbilling" (R. 27). The Union's requests to the store managers contemplated, not that they would refuse to perform employment services in order to coerce their employer, but that they would make a business decision to terminate dealings with Servette.

B. The legislative evolution of Section 8(b)(4)(i) supports this conclusion. The old Section 8(b)(4)(A) was indisputably concerned only with union efforts to coerce the neutral employer's decision through inducing a withdrawal of employment services by his employees; it was not aimed at other means of achieving a boycott of the primary employer by the neutral employer. See *Local 1976, Carpenters* v. *National Labor Relations Board,* 357 U.S. 93, 98. The changes made in Section 8(b)(4)(A) by clause (i) of the 1959 amendments—substituting the phrase "individual employed by any person" for "employees of any employer," and striking out the word "concerted"—did not alter the central theme of the prohibition—*i.e.*, that it applies only to secondary pressure on a neutral employer in the form of inducements of employees to refuse to perform employment services.

C. Section 8(b)(4)(ii), added in 1959, also shows that Section 8(b)(4)(i) was not intended to bar requests to a neutral employer, or to his authorized managerial employees, to join in a boycott against the primary employer. Section 8(b)(4)(ii) forbids a union to "threaten, coerce, or restrain" any person for an object of forcing him to cease doing business with any other person. This provision would be almost entirely unnecessary if Section 8(b)(4)(i) forbade even the mere inducement of management personnel to cease dealing with some other person. Moreover, Section 8(b)(4)(ii) was plainly intended to leave the union free to request, beg, or persuade a firm (and thus its managerial personnel) to aid the union voluntarily by breaking off business relations

with an unfair employer. Section 8(b)(4)(i) cannot have been meant to forbid conduct that Section 8(b)(4)(ii) carefully left free.

II

The union's handbilling at the retail markets, urging members of the public not to purchase products which the markets had obtained from Servette, is privileged under the publicity proviso to Section 8(b)(4)(B). This proviso, added to Section 8(b)(4) in the Conference Committee, exempts from the reach of that section "publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a dispute and are distributed by another employer." The purpose of the proviso is to leave the union an avenue for the exercise of the right of free speech in advising the consuming public that certain products are sold by a company with whom the union has a dispute and in urging the public not to assist the primary employer by buying its products. The question here is whether the candy, salad dressing and "Old London Products" (mentioned in the handbills and obtained by the markets from Servette) were products "produced by" Servette. Contrary to the view of the court below, the operations of a wholesaler like Servette fall within the proviso.

The term "produced" is a familiar one in labor law. Prior to the enactment of the proviso the word "produced" had been applied, under the Fair Labor Standards Act and the War Labor Disputes Act, to the

operations of distributive organizations engaged in obtaining merchandise in large lots and distributing it to smaller outlets. These examples were presumably well known to the draftsmen of the 1959 amendments and there is no reason to believe that they intended to give the term "produced" any narrower meaning in the proviso to Section 8(b)(4). Moreover, construing "produced" in the proviso to encompass the operations of a distributor like Servette is in accord with the familiar common law "unity of interest" doctrine which holds that a labor union has a justifiable interest in following down to the retail level products which are handled at any stage of manufacture and distribution by an employer who fails to conform to what the union regards as fair employment standards. See *Goldfinger* v. *Feintuch*, 276 N.Y. 281, 11 N.E. 2d 910. A narrower construction of the proviso would severely limit the rights of unions to appeal to consumers to support the union in a dispute and would needlessly close the avenue of free speech that Congress so carefully kept open for publicity other than picketing.

ARGUMENT

I

THE APPEALS TO THE STORE MANAGERS TO CEASE DEALING WITH SERVETTE DID NOT VIOLATE SECTION 8(b)(4)(i)(B) OF THE ACT

A. THE WORDS OF SECTION 8(b)(4)(i)(B) DO NOT REACH A MERE REQUEST THAT A CUSTOMER CEASE DEALING WITH AN EMPLOYER THAT THE UNION CONSIDERS UNFAIR

Section 8(b)(4)(i) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of

1959, 73 Stat. 519, 542, provides that it shall be an unfair labor practice for a union or its agents—

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; * * *

where "an object thereof is"—

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *.

It is apparent on its face that Section 8(b)(4)(i) deals only with a union's appeal to one or more individuals who work for Firm A to "engage in * * * a refusal" to perform employment services for the purpose of "forcing or requiring" Firm A to stop doing business with Firm B, with which the union is engaged in controversy. It is the putting of economic pressure upon Firm A, by cutting off employment services, that Section 8(b)(4)(i) seeks to prevent. The provision leaves the union entirely free to ask Firm A and all firms similarly situated to break off their business relations with Firm B so long as the labor dispute continues.[3] Thus, the prohibitions

[3] In the classical sense, this is not even a secondary, but only a primary, boycott. See Teller, *Labor Disputes and Collective Bargaining* (1940), Vol. I, Sec. 145; *Duplex Printing Co.* v. *Deering*, 254 U.S. 443, 446.

of Section 8(b)(4)(i) are inapplicable if the union merely requested the appropriate person to make that managerial decision. They apply only if the union asked an individual employed by Firm A to quit all or part of his work so as to coerce the firm's decision.

If Firm A is a small individual proprietorship, A is the one who decides whether to continue to deal with Firm B; and Section 8(b)(4)(i) is obviously inapplicable to a union's request that he boycott Firm B.* If Firm A is a corporation, the decision whether to join in the boycott against Firm B must be made by some individual (or group) employed by the corporation with managerial powers. The controlling principle, nonetheless, is the same. If the union merely asks the corporation to join in the boycott by addressing itself to the individual with the authority to make that decision, there is no violation. Section 8(b)(4)(i) is violated, if at all, only if the request is that the individual stop performing employment services so as to put pressure upon the managers of Firm A in reaching their decision.

In the present case it is entirely clear that the store managers were merely requested to exercise their authority to decide whether to continue, or cease,

---

* Section 8(b)(4)(ii) comes into play, as discussed below, if the request is accompanied by a threat or coercion.

In some instances the Union sought to put pressure on the managers by threatening to appeal to the customers to withhold their patronage. We discuss below the question whether such appeals violate Section 8(b)(4)(ii). Any such pressure is obviously irrelevant to the present question under Section 8(b)(4)(i); the decision remained the managers', and it was a decision not to patronize, rather than not to work.

buying from Servette. The action they were asked to take—the decision they were asked to make—was identical to the request that would be made of an individual proprietor. They were asked *to decide,* not to exert the pressure of a refusal to work in order to coerce someone else's decision. Referring to the words of Section 8(b)(4)(i), the store manager was not asked "to engage in a strike" or to do anything "in the course of his employment" that can fairly be described as "a refusal * * * to use, manufacture, process, transport, or otherwise handle or work on any goods" or "to perform any services" with an object of "forcing or requiring" the manager's employer to cease dealing with Servette. The managers were asked only to exercise their managerial authority on behalf of their employers and in accordance with the discretion vested in them by their employers. They were not asked to apply economic pressure with an object of "forcing or requiring" their employers to decide to cease dealing with Servette.

B. THE LEGISLATIVE HISTORY OF SECTION 8(b)(4)(i) SHOWS THAT IT WAS INTENDED TO REACH ONLY REFUSALS TO PERFORM WORK FOR A SECONDARY EMPLOYER INTENDED TO FORCE HIM TO CEASE DEALING WITH THE PRIMARY EMPLOYER

Our analysis of Section 8(b)(4)(i) is confirmed by its legislative evolution. Prior to the 1959 amendments Section 8(b)(4)(A) declared it an unfair labor practice for a labor organization—

> to induce or encourage the employees of any employer to engage in, a strike or a concerted

> refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services * * *

where an object was to force such employer to cease doing business with any other person. That provision was indisputably concerned only with inducement of the employees of Firm A to refuse to work in order to coerce Firm A's decision about doing business with Firm B. *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 98. A mere request that the authorized personnel of a company exercise their authority to stop dealing with an employer with whom the union had a dispute was not prohibited by this section. It left the union free to persuade Firm A to boycott Firm B. It even left the union free to exert pressure on Firm A in ways other than inducing its employees to engage in a work stoppage (*e.g.*, threatening the officials of Firm A with a strike, or picketing its place of business with signs urging the public not to patronize it).[5]

The changes made in Section 8(b)(4)(A) by clause (i) of the 1959 amendments were not intended to alter this basic pattern.[6] Clause (i) substituted the

---

[5] See *Sealright Pacific, Ltd.*, 82 NLRB 271, 272, n. 4; *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 911–912 (C.A. 2); *National Labor Relations Board* v. *Business Machine & Office Appliance Mechanics Conference Board*, 228 F. 2d 553, 559–561 (C.A. 2), certiorari denied, 351 U.S. 962; *National Labor Relations Board* v. *International Union of Brewery Workers*, 272 F. 2d 817, 819 (C.A. 10); *United Wholesale & Warehouse Employees, Local 261* v. *National Labor Relations Board*, 282 F. 2d 824 (C.A.D.C.).

[6] The effect of clause (ii) is discussed *infra*, pp. 20–26.

phrase "individual employed by any person" for "employees of any employer," and struck out the word "concerted." The purpose of the first change was to make the provision applicable to work stoppages by employees (in a colloquial sense) who were not technically "employees" within the statutory definitions.[1] The purpose of the second change was to make it clear that the inducement of a secondary work stoppage was interdicted even if the inducement was

[1] The definition of "employer" in Section 2(2) of the Act excludes the federal and state governments and their agencies or subdivisions, nonprofit hospitals, and those subject to the Railway Labor Act. The definition of "employee" in Section 2(3) excludes agricultural laborers, supervisors, and employees of an employer subject to the Railway Labor Act. Under Section 8(b)(4)(A), the Board had held that it was not unlawful for a union to induce the employees of a neutral employer to engage in a work stoppage if the neutral or his employees were excluded from the Act's coverage under Section 2. Thus, it was permissible for a union to induce work stoppages by minor supervisors, and farm, railway or public employees. See *Ferro-Co Corp.*, 102 NLRB 1660 (supervisors); *Arkansas Express, Inc.*, 92 NLRB 255 (supervisors); *Conway's Express*, 87 NLRB 972, 980, affirmed, 195 F. 2d 906, 911 (C.A. 2) (supervisors); *Great Northern Railway Co.*, 122 NLRB 1403, enforcement denied, 272 F. 2d 741 (C.A. 9), and supplemental Board decision, 126 NLRB 57 (railroad employees); *W. T. Smith Lumber Co.*, 116 NLRB 1756, enforcement denied, 246 F. 2d 129, 132 (C.A. 5) (railroad employees); *International Rice Milling Co., Inc.*, 84 NLRB 360, 361, enforcement denied, 183 F. 2d 21, 25–26 (C.A. 5), reversed on other grounds, 341 U.S. 665, 668 (railroad employees); *Paper Makers Importing Co., Inc.*, 116 NLRB 267, 275 (municipal employees). Compare *Di Giorgio Fruit Corp.*, 87 NLRB 720, 721, enforced 191 F. 2d 642, 646–647 (C.A.D.C.), certiorari denied, 342 U.S. 869 (agricultural labor organization).

directed to only one individual.[8] Neither of these changes altered the central theme of the prohibition—*i.e.*, that it applies only to refusals to perform employment services for a secondary employer for the purpose of "forcing" that secondary employer to cease dealing with the employer with whom the union has a dispute.

Thus, the changes made in Section 8(b)(4)(A) by clause (i) first appeared in the Administration bill, which was introduced by Senator Goldwater.[9] Testifying in its behalf, Secretary of Labor Mitchell stated that the change was designed to cure the situation whereby unions could "avoid the existing provisions by inducing individual employees, or workers not defined as employees by the act such as railroad and agricultural workers—to refuse to handle the products of the person with whom they want the employer to cease doing business."[10] However, the bill which was reported by the Senate Committee and which was first passed by the Senate (the Kennedy-Ervin bill) made no changes in the old Section 8(b)(4)(A).[11]

---

[8] Some cases had held that the inducement was proscribed only if directed to two or more employees. See *Joliet Contractors Ass'n* v. *National Labor Relations Board*, 202 F. 2d 606, 612 (C.A. 7), certiorari denied, 346 U.S. 824; cf. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 671.

[9] See Sec. 503(a) of S. 748, I *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (G.P.O., 1959) 142.

[10] Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 86th Cong., 1st Sess., S. 505, *et seq.*, p. 265.

[11] S. 1555, I *Leg. Hist.* 582; see S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 80 (Minority Views), *I Leg. Hist.* 476.

The Landrum-Griffin bill, which was introduced in the House, contained a clause (i) similar to that of the Administration bill, making it unlawful "to induce or encourage any individual employed by any person" to engage in "a strike or a refusal in the course of his employment" to perform certain services.[12] An analysis submitted by the sponsors explained the purpose of this amendment as follows:[13]

> Present law provides that it is unlawful for a union to induce or encourage "employees of any employer" to engage in strike or "concerted refusal" to do their work for one of the forbidden objects listed in section 8(b)(4)— * * * Since farm laborers, railway labor, and supervisors are not "employees" within the meaning of the Act, unions may now without penalty induce them to engage in secondary boycotts. This bill corrects this by changing the word "employees" in the phrase quoted above to "any individual employed by any person." This change appears in clause 4(i).
>
> As the present act forbids inducing "employees" to engage in a strike or "concerted" refusal to do their work, the courts have held that unions may induce employees one at a time to engage in secondary boycotts. By changing "employees" to "any individual" and omitting the word "concerted", the proposed revision of

---

[12] Sec. 705(a) of H.R. 8400, I *Leg. Hist.* 680.

[13] 105 Cong. Rec. 14347, II *Leg. Hist.* of the Labor-Management Relations and Disclosure Act of 1959 (G.P.O. 1959), 1522–1523. See also, 105 Cong. Rec. 15532 (Cong. Griffin), II *Leg. Hist.* 1568.

clause 4(i) closes this loophole. [Footnote omitted.]

The Landrum-Griffin bill passed the House with the clause (i) addition to Section 8(b)(4).

The Conference Committee accepted Section 8(b)(4)(i) of the House bill, after adding a proviso to make clear that the omission of the word "concerted" was not intended to bring legitimate primary activity within the Act's ban on secondary boycotts.[14] As Senator Kennedy explained to the Senate respecting the amendment to Section 8(b)(4): "The chief effect of the conference agreement * * * will be to plug loopholes in the secondary boycott provisions of the National Labor Relations Act. There has never been any dispute about plugging these artificial loopholes."[15]

In sum, the legislative history of Section 8(b)(4)(i) establishes that the changes made in the old Section 8(b)(4)(A)—including the substitution of "individual employed by any person" for "employees of any employer"—were not intended to alter the basic scheme of the prior section, which applied only to attempts to coerce a secondary employer to cease dealing with a primary employer by inducing employees

---

[14] The proviso inserted at the end of Section 8(b)(4)(B), reads:

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *.

[15] 105 Cong. Rec. 17898, II *Leg. Hist.* 1431. See also, 105 Cong. Rec. 17881–17882 (Senator Morse), 18022 (Congressman Griffin), 19771 (Senator Goldwater); II *Leg. Hist.* 1425–1426, 1712, 1857.

of the secondary employer to refuse to perform employment services. Section 8(b)(4)(i), like the old Section 8(b)(4)(A), was therefore not intended to preclude a labor union from asking an employer—and thus the authorized managerial employees of a corporation—to join in a boycott against the primary employer.

C. SECTION 8(b)(4)(ii) ALSO SHOWS THAT SECTION 8(b)(4)(i) WAS NOT INTENDED TO BAR THE INDUCEMENT OF THE AUTHORIZED MANAGERIAL PERSONNEL OF A NEUTRAL EMPLOYER TO EXERCISE THEIR DELEGATED AUTHORITY TO CEASE DEALING WITH A PRIMARY EMPLOYER

We have so far discussed Section 8(b)(4)(i) in isolation from its relationship to Section 8(b)(4)(ii). The latter section forbids a union to "threaten, coerce, or restrain" any person where an object thereof is forcing him to cease doing business with any other person. It is our contention that Section 8(b)(4)(i) was intended to reach coercion of a neutral employer for the object of forcing him to cease dealing with a primary employer, by means of inducing work stoppages among individuals employed by the neutral; and that Section 8(b)(4)(ii) was intended to reach all other forms of coercion of a neutral employer for the same proscribed purpose. If Section 8(b)(4)(i) were not limited to prohibiting the inducement of work stoppages among the neutral's employees but were to be construed—as it was by the court below—to forbid inducing the authorized managerial personnel of a neutral employer to exercise their delegated authority to cease dealing with a primary employer, then (1) Section 8(b)(4)(ii) would be rendered almost entirely

unnecessary and (2) Section 8(b)(4)(i) would reach and forbid conduct that Section 8(b)(4)(ii) was plainly intended to leave free and permissible.

(1) Section 8(b)(4)(i) applies whether or not there is any coercion of the individual induced to refuse to perform employment services. If it were intended to prohibit appeals to authorized management personnel of a neutral employer to cease dealing with a primary employer, then every attempt to "threaten, coerce, or restrain" a corporation doing business with a primary employer would be prohibited by Section 8(b)(4)(i) without need for Section 8(b)(4)(ii); for every such attempt would necessarily involve inducing individuals employed by the corporation to cease dealing with the primary employer. The same would be true of partnerships or sole proprietorships unless the request that the firm cease dealing were directed solely to the owners and not to their managerial employees.

(2) More important, Section 8(b)(4)(ii) applies only if the union undertakes "to threaten, coerce, or restrain" any person. It does not apply to mere encouragement or persuasion of one person to cease dealing with another person and was plainly intended to leave such appeals for voluntary cooperation permissible so long as they are not accompanied by any form of coercion. But if Section 8(b)(4)(i)—which applies without any showing of coercion of the person induced or encouraged to refuse to perform employment services—forbids the union to encourage or persuade managerial personnel of a neutral to exercise their delegated authority to cease dealing with a

primary employer, then that Section forbids the very conduct that Section 8(b)(4)(ii) was plainly meant to leave free.

As we have shown (*supra*, pp. 14–15), the old Section 8(b)(4)(A) left the union free, not only to persuade Firm A to boycott Firm B, but also to coerce that result by threatening Firm A with a strike or by picketing its place of business with signs urging the public not to patronize it. By clause (ii), Congress intended to proscribe the last two means of achieving a boycott, but not the first. The words "threaten, coerce, or restrain" were chosen deliberately in order not to interfere with the union's freedom to obtain truly voluntary assistance from sympathetic employers as had often occurred in the past.

Thus, the following colloquy occurred between Secretary of Labor Mitchell and Senator Kennedy with respect to the provision of the Administrative bill analogous to Section 8(b)(4)(ii):[16]

> Senator KENNEDY. Mr. Secretary * * *
>
> I would like to ask you a question regarding section 503(a) of your bill: There is a manufacturer of clothing "A." He begins to purchase the products of a plant which is under the domination of racketeers * * *. Would it be a violation of section 503 of your bill if the business agent of the Clothing Workers Union at company A spoke to the plant manager and requested him not to order materials—nonunion materials—from the racketeer plant in Pennsylvania?

[16] Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess., on S. 505, *et seq.*, pp. 304–305.

Secretary MITCHELL. We don't think it would be, Senator.

Senator KENNEDY. Now, supposing the plant in Pennsylvania was a nonunion plant, would it be a violation under your bill for union leaders in another company to go to his plant manager and ask him not to buy goods from the nonunion plant?

Secretary MITCHELL. Request him not to buy? No.

Senator KENNEDY. Now, if the representative of the union at plant A told the manufacturer that the members of the union would not continue to work on goods which were secured from the racketeer's shop?

Secretary MITCHELL. In that case, it is my interpretation of our proposal that that would be coercion. And our proposal prohibits coercion for the purpose of bringing pressure on an employer not to buy merchandise from a neutral third party.

Similarly the Conference Committee, in adopting clause (ii) of the Landrum-Griffin amendment to Section 8(b)(4), understood that the clause was intended to reach only threats, restraint, or coercion of the secondary employer and not a mere request to him for voluntary cooperation. Senator Dirksen, one of the conferees, stated that the new amendment "makes it an unfair labor practice for a union to try to coerce or threaten an employer directly (*but not to persuade or ask him*)" in order to "get him to stop

doing business with another firm or handling its goods (emphasis added)."[17]

In sum, it is apparent that, in enacting Section 8(b)(4)(ii), Congress intended to leave unions free to appeal, without coercion, to the authorized personnel of a neutral company to exercise their discretion to cease dealing with a primary employer. Obviously, Section 8(b)(4)(i) was not meant to forbid the very conduct which Section 8(b)(4)(ii) had carefully left permissible. Where such an appeal to management personnel was accompanied by threats or coercion, Section 8(b)(4)(ii) was intended to apply. Section 8(b)(4)(i) was reserved for one specific problem—the only one dealt with in the prior act—that of the inducement of refusals to work among the individuals working for a neutral employer in order to put pressure on that employer (and his authorized managerial personnel) to cease dealing with a primary employer.[18]

---

[17] 105 Cong. Rec. 19849, II Leg. Hist. 1823. See also, 105 Cong. Rec. 17881-17882 (Senator Morse), II Leg. Hist. 1426.

[18] While the Board in *Local No. 505, International Brotherhood of Teamsters, etc. (Carolina Lumber Co.)*, 130 NLRB 1438, and subsequent cases has phrased the issue in terms of whether the individual induced is high enough in the managerial heirarchy to make a managerial decision (*i.e.*, Section 8(b)(4)(i) applies to the inducement of a low, but not a high, level supervisor), rather than in terms of what it is he has been requested to do (*i.e.*, to exercise his managerial discretion or to cease performing employment services for his employer), its decisions are consistent with the analysis set forth herein. In each instance where the inducement was found to be outside of Section 8(b)(4)(i) the individual induced not only had power to make a managerial decision but was requested to make such a decision, rather than to cease performing employment services for his employer. See *Local 294, International Brotherhood of Teamsters, etc. (Van Transport Lines, Inc.)*, 131 NLRB 242; *Amalgamated Meat Cutters and Butcher*

This construction of Section 8(b)(4)(i) has been approved by the Second Circuit in *National Labor Relations Board* v. *Local 294, Teamsters (Van Transport Lines)*, 298 F. 2d 105; and see *Alpert* v. *Excavating & Building Material Chauffeurs, Local 379*, 184 F. Supp. 358 (D. Mass.), Wyzanski, J.

Applying these principles to the instant case, the Board properly concluded that the Union's requests to the store managers to cease handling products distributed by Servette were not interdicted by Section 8(b)(4)(i). The store managers, being the highest managerial officials in the stores, "were authorized to decide as they best could whether to continue doing business with Servette in the face of threatened or actual handbilling" (R. 27). The Union's request to the store managers contemplated, not that they would refuse to perform employment services for their employer in order to coerce someone else's decision, but that they would make a business decision themselves. The Union's object was "to induce the various store managers to cease doing business with Servette by

---

Workmen of North America, AFL–CIO (Peyton Packing Company, Inc.), 131 NLRB 406; *Sheet Metal Workers International Association, Local Union No. 299 (S. M. Kisner and Sons)*, 131 NLRB 1196; *Local 324, International Union of Operating Engineers (Brewer's City Coal Dock)*, 131 NLRB 228; *Upholsterers Frame & Bedding Workers Twin City Local No. 61 (Minneapolis House Furnishing Co.)*, 132 NLRB 40; *Excavating and Building Material Chauffeurs and Helpers Local Union No. 379 (Consalvo Trucking, Inc.)*, 132 NLRB 827; *International Brotherhood of Teamsters, etc., and Dairy Employees Local 537 (Lohman Sales Company)*, 132 NLRB 901; *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 901 (Editorial "El Imparcial," Inc.)*, 134 NLRB 895; *Warehouse Employees Union, Local 730 (C. R. Sheaffer and Sons)*, 136 NLRB 968.

holding out the prospect that failure to do so would result in diminished trade" (R. 28). The court below thus erred in holding that the Union's requests to the store managers were barred by Section 8(b)(4)(i).

II

THE UNION'S HANDBILLING AT THE RETAIL STORES DID NOT VIOLATE SECTION 8(b)(4)(ii)(B) OF THE ACT

Section 8(b)(4)(ii)(B), as we have shown, makes it unlawful to "threaten, coerce, or restrain any person" where an object is to force him to cease doing business with any other person. However, the second proviso to Section 8(b)(4) states—

> Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution * * *.

The Board concluded that the Union's handbilling of the various stores, as well as the threats to handbill, did not violate Section 8(b)(4)(ii)(B) because the activity is protected by the above-quoted proviso to Section 8(b)(4).

The publicity proviso to Section 8(b) exempts from the reach of the section—

> "publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *."

Distributing handbills is certainly a form of publicity. There was no picketing. The handbills truthfully advised the public that the stores were distributing the products of Servette with whom the Union had a primary dispute.[19] The only question, therefore, is whether the candy, salad dressing, and "Old London Products" were "a product or products produced by" Servette. The court below held that these products were not "produced" by Servette because it is a distributor rather than a manufacturer of the products

[19] The handbills asked the consuming public not to buy the following products distributed by SERVETTE, INC.: Brach's Candy, Servette Candy, Good Season Salad Dressing, Old London Products (R. 84). All of the markets handled these products, and obtained one or more of them from Servette. However, since some of the markets purchased some of the products from distributors other than Servette, the Company contended before the Board and in the court below that the handbilling was untruthful and not protected by the proviso for this additional reason. The Board rejected this contention, finding no misrepresentation since all of the stores where the handbilling took place (or was threatened) did business with Servette, all purchased from Servette at least one and in most cases two of the items listed in the handbill, and all of the listed items were distributed by Servette (R. 28–29). As the Board pointed out in *International Brotherhood of Teamsters, etc., Local 537 (Lohman Sales Co.)*, 132 NLRB 901, 906, "the proviso does not require that a handbiller be an insurer that the content of the handbill is 100 percent correct, and that

(R. 98).[20] We submit that the term "produced" is not limited to manufacture, but also includes the work performed by Servette.

The term "produced" has no single commonly accepted meaning applicable to all contexts. A stage play is spoken of as "produced" and an automobile can be "produced." A product such as a bottled soft-drink may be considered "produced" when its formula is invented, when the ingredients of its formula are combined, when the necessary carbonated water is added to the formula, when it is bottled, or when all these steps plus the steps of distribution for sale by repackaging and transportation have taken place. Food products such as those handled by Servette may also be thought of as "produced" at the end of any of a number of stages up to and including the processes of storing, repackaging, and transporting the products for ultimate sale to a consumer. No single layman's meaning of "produced" is available to specify the precise meaning of the phrase in the proviso "produced by an employer with whom the labor organization has a dispute."

The term "produced" is, however, a familiar one in labor law. Even if we assume *arguendo* that it is intended as a word of limitation in the proviso, its well known meaning is amply broad enough to cover the activities of a wholesaler who buys and stores

---

where, as here, there is no evidence of an intent to deceive and there has not been a substantial departure from fact, the requirements of the proviso are met." The court below did not disturb the Board's finding on truthfulness.

[20] The court followed its decision in *Great Western Broadcasting Corp.* v. *National Labor Relations Board*, 310 F. 2d 591.

goods, breaks lots, repackages, relabels or otherwise handles the goods.[21] Under the Fair Labor Standards Act, the term "produced" is defined as "produced, manufactured, mined, handled, or in any other manner worked on" (29 U.S.C. 203(j)), and it has been long and regularly applied to employees of distributive organizations such as Servette engaged in obtaining merchandise in large lots and distributing it to smaller outlets. See, *e.g.*, *Walling* v. *Mutual Wholesale Food Co.*, 141 F. 2d 331, 340 (C.A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C.A. 8); *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329 (C.A. 7); *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C.A. 8); *Mitchell* v. *Pidcock*, 299 F. 2d 281 (C.A. 5); cf. *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490. Similarly, although the War Labor Disputes Act did not include the express definition of "produced" found in the Fair Labor Standards Act, it was held in *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369 (C.A. 7), that the general retail department and mail order business of Montgomery Ward & Co. so involved the production of goods that these facilities could lawfully be

---

[21] The Board has not confined the proviso to the situation presented in this case, where the union was following the goods themselves, but has extended it more broadly to publicity involving any economic relations between the establishment where the handbilling takes place and an employer with whom the union is in dispute. See *Middle South Broadcasting Co.*, 133 NLRB 1698; *Great Western Broadcasting Corp.* (*KXTV*), 134 NLRB 1617, reversed and remanded, 310 F. 2d 591 (C.A. 9); *United Plant Guard Workers* (*Houston Armored Car Co.*), 166 NLRB 110. Since physical products are involved here, it is unnecessary to determine the correctness of the Board's view that the proviso is not limited thereto.

seized under the statute authorizing the seizure of facilities equipped "for the manufacture, production, or mining of any * * * materials" (50 U.S.C. App. (1946 ed.) 1503).

Congress was presumably aware of this traditional meaning of the term "produced" in labor law and intended to incorporate the familiar usage in the proviso rather than some other but wholly unspecified meaning. Indeed, only this traditional meaning is fully consistent with the purposes of the proviso.

The primary purpose of the publicity proviso was to provide an avenue for the union's exercise of its rights of free speech. Senator Kennedy and Congressman Thompson had criticized Section 8(b)(4)(ii) of the Landrum-Griffin Bill, which did not contain the proviso, on the ground that [22]

> one of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression. The portions of the House bill which have this effect are unacceptable.

Thereafter, the publicity proviso was added by the Conference Committee to guarantee the preservation of the union's rights of free speech. In a report to the Senate on the changes made by the Conference Committee, Senator Kennedy explained: [23]

> * * * The House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike at a primary plant.

[22] 105 Cong. Rec. 16591, II *Leg. Hist.* 1708.

[23] 105 Cong. Rec. 17720, II *Leg. Hist.* 1388–1389.

> We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper.
>
> Under the language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth.

The proviso added to preserve an avenue of free expression for the union was generally described by the congressional leaders on both sides as broadly authorizing appeals to consumers not to purchase unfair goods so long as the appeal was not by picketing and would not cause work stoppages. The scope of the privilege was apparently assumed to be at least as broad as the traditional right to follow the product sold by any unfair employer for resale to consumers who might be sympathetic to the union's cause, so that they could be informed of the union's grievances. Thus, for example, Congressman Thompson explained to the House:[24]

> * * * The right to publicize nonunion goods to consumers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will also be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. * * *

---

[24] 105 Cong. Rec. 18133, II *Leg. Hist.* 1720.

And Senator Dirksen said of the bill: [25]

> * * * It bars a union from picketing a retail store to advertise that the store is handling the goods of a firm the union was striking, but permits other forms of such advertising—handbills, for example—if they do not cause the store's employees to stop working or prevent pickups and deliveries.

Although occasionally the proviso was loosely described as authorizing the union to follow the goods of a "manufacturer," the legislative history contains no mention—much less discussion—of any purpose to limit the scope of the proviso to following the goods of a manufacturer and not the goods of a prior distributor,[26] and no explanation of why such a limitation might have been imposed is apparent even in retrospect. Indeed any such limitation on the traditional uses of appeals to consumers would have amounted, in the case of the employees of a distributor, to closing every practicable avenue by which a union could inform the ultimate consumers of an employer's products of its dispute with the employer—a result Congress was assiduous to avoid whenever it became aware of the problem.

It thus appears that Congress intended the proviso to have, at least, the effect of allowing a labor union to exercise its traditional rights to follow down to the retail level products which are handled at any stage in the course of manufacture and distribution by an

---

[25] 105 Cong. Rec. 19849, II *Leg. Hist.* 1823.

[26] This is in marked contrast to the debate surrounding every obvious and apparent limitation of the scope of the proviso.

employer who fails to conform to what the union regards as fair employment standards. Thus construed, the proviso would permit a labor union to follow an "unfair" product but not to spread the labor dispute more widely through the community by putting pressure upon any firm that had any form of business relations with a firm engaged in a labor dispute. This distinction was well known in labor law and was before the Congress which passed the 1959 amendments.[27] Compare *Bossert* v. *Dhuy*, 221 N.Y. 342, 117 N.E. 582, and *Goldfinger* v. *Feintuch*, 276 N.Y. 231, 11 N.E. 2d 910, with *Auburn Draying Co.* v. *Wardell*, 227 N.Y. 1, 124 N.E. 97. See also Teller, *Labor Disputes and Collective Bargaining* (1940), Vol. I, Sec. 123; Gregory, *Labor and the Law* (1961 ed.), pp. 132–153.[28]

In sum, if the term "produced" is given its familiar meaning in the area of labor law, the effect of the proviso is to allow unions that freedom to inform the public of unfair products which has been accepted under prior notions of "following the product" and

---

[27] See the remarks of Senator Morse, 105 Cong. Rec. 17882–17883, II *Leg. Hist.* 1426–1427.

[28] The cases applying the "following the product" or "unity of interest" principle have not limited it to situations where the primary employer was the manufacturer of the "unfair product." See *Alliance Auto Service, Inc.* v. *Cohen*, 341 Pa. 283, 19 A. 2d 152 (union had primary dispute with a distributor of petroleum products and auto accessories, and in furtherance thereof picketed retail stations selling products obtained from that distributor; picketing held to be permissible); *Fortenbury* v. *Superior Court*, 106 P. 2d 411 (union had primary dispute with a poultry farm and in furtherance thereof picketed poultry market selling its products; picketing held to be permissible).

which alone would fulfill the purpose of the proviso to preserve some effective means of enlisting the aid of the consuming public in a dispute with an employer whose products are sold to the public. There was therefore no reason for the court below to narrow the effect of the proviso because of Congress' choice of the term "produced." The court attributed a false significance, we think, to the use of the words "producer, processor or manufacturer" in earlier parts of Section 8(b)(4). See *Great Western Broadcasting Corp.* v. *National Labor Relations Board*, 310 F. 2d at 595–597. This Court has cautioned that "insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments." *Local Lodge No. 1424, Machinists* v. *National Labor Relations Board*, 362 U.S. 411, 417, n. 7. In any event, it is evident that this prolifieration of nouns was merely used to be sure to cover all forms of activity. It was not intended to equate the activities described by each noun. The fact that the draftsmen of the proviso used only the broadest word "produced" does not show that they intended it to cover only manufacturing and processing. Indeed, if that had been the purpose, the 1959 draftsmen with the earlier words before them would undoubtedly have used the word "manufac-

tured" or "processed" instead of the broader term "produced".

Similarly, we submit that no significance can be drawn from the fact (see *Great Western, supra,* at 600) that another version of the proviso, contained in a request by the Senate conferees for instructions from the Senate, read (105 Cong. Rec. 17333, II Leg. Hist. 1383):

> Provided, That nothing contained in this subsection (b) shall be construed * * * to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor dispute * * *.

There was no vote on the request because the Chairman of the Senate Conferees, Senator Kennedy, shortly thereafter reported that the conferees had accepted the proposals of the Senate's representatives. All the other evidence in the legislative history indicates that the intent of the proviso was to authorize all forms of appeals to the public not to purchase "unfair goods" provided that the publicity was not accompanied by picketing (*supra,* pp. 30–32).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with directions to sustain the Board's order dismissing the complaint.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
PHILLIP B. HEYMANN,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LEE M. MODJESKA,
Attorney,
National Labor Relations Board.

SEPTEMBER 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended in 1959 (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status

of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer

are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * *

The relevant provisions of the National Labor Relations Act, as it existed prior to the 1959 Amendments (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), are as follows:

* * * * *

SEC. 8.

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where the object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or em-

ployer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1965

MOTION FILED SEP 27 1963
LIBRARY
SUPREME COURT, U. S.

No. 141

In the Supreme Court of the United States

OCTOBER TERM, 1963

NATIONAL LABOR RELATION BOARD,
Petitioner

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Motion for Leave to File a Brief Amici Curiae, and Brief Amici Curiae, of American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

NEYHART & GRODIN
DUANE B. BEESON
1035 Russ Building
San Francisco, California

Attorneys for American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

SORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

	Page
Motion	1
Brief	7
Opinions Below	7
Jurisdiction	7
Questions Presented	8
Statute Involved	8
Statement	8
Argument	9
Introductory Statement	9
I. The Peaceful Circulation of Handbills Which Identify Persons Who Do Business with a Struck Employer Is Protected by the First Amendment to the Federal Constitution	10
A. The Handbilling Activity in This Case Constitutes Freedom of Speech and the Press Within the Meaning of the First Amendment	10
B. The Possibility That Store Owners May Cease Doing Business with the Struck Employer to Avoid a Withdrawal of Consumer Patronage Caused by Handbilling Does Not Provide a Permissible Reason to Prohibit Communication	15
1. The Possibility That the Store Owners Will Suffer Loss of Patronage	15
2. The Possibility That the Store Owners May Cease Doing Business with Servette	19
II. The Handbilling in This Case, in Any Event Is Not Within the Proscription of Section 8(b)(4)(ii)(B) of the Act	23
A. The Statutory Provisions Involved	23
B. The Statutory Interdiction Against Threats, Coercion and Restraint Does Not Reach the Union's Handbilling Activity	23
Conclusion	30
Appendix	31

CITATIONS

Cases	Pages
Bakery Drivers v. Wohl, 315 U.S. 769	11, 12
Chauffeurs, Teamsters & Helpers Local 795 v. Newell, 356 U.S. 341	11
Dennis v. United States, 341 U.S. 494	14
Drivers Local 639 v. National Labor Relations Board, 362 U.S. 274	30
Fox v. Washington, 236 U.S. 273	20
Giboney v. Empire Storage & Ice Co., 336 U.S. 490	15, 20
Gompers v. Bucks Stove, 221 U.S. 418	18
Great Western Broadcasting Corp. v. National Labor Relations Board, 310 F. 2d 591	2, 3
Guiseppi v. Walling, 144 F. 2d 608	24
Hormel v. Helvering, 312 U.S. 552	15
Hughes v. Superior Court, 339 U.S. 460	12
I.B.E.W. v. National Labor Relations Board, 341 U.S. 694	15, 18
Jamison v. State of Texas, 318 U.S. 413	11
Leedom v. I.B.E.W. Local 108, 278 F. 2d 237 (C.A. D.C.)	5
Local 662, Radio and Television Engineers (Middle South Broadcasting Co.), 133 N.L.R.B. 1698	3
Local 761, I.U.E. v. National Labor Relations Board, 366 U.S. 667	29
Local Lodge No. 1424 v. National Labor Relations Board, 362 U.S. 411	24
Local 1907, Carpenters Union v. National Labor Relations Board, 357 U.S. 93	20
Local 1976, Carpenters v. National Labor Relations Board, 357 U.S. 93	24
Loewe v. Lawlor, 208 U.S. 274	18
Lohman Sales Company, 132 N.L.R.B. 901	3, 4
Lowell v. Griffin, 303 U.S. 442	10
Marsh v. Alabama, 326 U.S. 501	12
Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253	4
Martin v. Struthers, 319 U.S. 141	12

Pages

National Labor Relations Board v. Denver Building Trades Council, 341 U.S. 675 17
National Labor Relations Board v. Drivers Local 639, 362 U.S. 274 ..... 24, 25
National Labor Relations Board v. Fruit & Vegetable Packers, No. 88, Oct. Term 1963 5
National Labor Relations Board v. I.A.M. Local 942, 263 F. 2d 796 (C.A. 9) 17, 18, 25
National Labor Relations Board v. Jones & Laughlin Steel Corp., 331 U.S. 416 4
Near v. Minnesota, 283 U.S. 697 12

Retail Clerks International Association, Local 1625 v. Schermerhorn, 373 U.S. 746 4

Smith v. California, 361 U.S. 147 11
Speiser v. Randall, 357 U.S. 513 14

Talley v. California, 362 U.S. 60 ..... 11, 12, 16
Teamsters Local 695 v. Vogt, 354 U.S. 284 11
Terminiello v. Chicago, 337 U.S. 1 16
Thomas v. Collins, 323 U.S. 506 ..... 11, 13, 14, 16
Thornhill v. Alabama, 310 U.S. 88 11

United States v. Hutcheson, 312 U.S. 219 19
United States v. Rumely, 345 U.S. 41 23

Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 10

Wood v. Georgia, 370 U.S. 375 16

STATUTES

Pages

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):
Section 8(b)(1) 24
Section 8(b)(1)(A) 25, 30
Section 8(b)(4) 3, 9, 26, 27
Section 8(b)(4)(ii) 2, 3, 4, 8, 17, 23, 24, 25, 26, 27, 28, 30
Section 8(b)(4)(ii)(B) 2, 3, 8, 23
Section 8(b)(4)(B) 2, 20, 29, 30
Section 8(b)(7) 28
Section 8(c) 17
Section 10(e) 4, 7

28 U.S.C. 1254 (1) 7

MISCELLANEOUS

Legislative History of Labor Management Reporting and Disclosure Act:
Vol. I, p. 142 24
Vol. II, p. 1079, 105 Daily Cong. Rec. 5764 26
Vol. II, p. 1193, 105 Daily Cong. Rec. 3510 26
Vol. II, p. 1388, 105 Daily Cong. Rec. 16254 29
Vol. II, p. 1432, 105 Daily Cong. Rec. 16414 29
Vol. II, p. 1454, 105 Daily Cong. Rec. 17181 29
Vol. II, p. 1523, 105 Daily Cong. Rec. 13092 26
Vol. II, p. 1615, 105 Daily Cong. Rec. 14339 26
Vol. II, p. 1712, 105 Daily Cong. Rec. 16539 29
Vol. II, p. 1722, 105 Daily Cong. Rec. 16637 29
Vol. II, p. 1750, 105 Daily Cong. Rec. A4308 26
Vol. II, p. 1823, 105 Daily Cong. Rec. A8274 29
Vol. II, p. 1842 27

Cox, Archibald, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minnesota Law Review, p. 57 27

Rayback, J. G., A History of American Labor (MacMillan, 1959), 29-30, 32 22

Hearings, Senate's Subcommittee on Labor, 86th Cong., 1st Sess., p. 410 24

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 111

NATIONAL LABOR RELATION BOARD,
Petitioner

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Motion for Leave to File a Brief Amici Curiae for American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55, hereafter referred to as AFTRA and NABET, respectively, move the Court for an order granting leave to file a brief amici curiae in the above-entitled case. The brief which this motion seeks to have filed and considered in

the disposition of this case appears in full *infra*, in the pages following the motion. The brief discusses the following two questions: (1) whether the handbilling activity in this case falls within the proscription of Section 8(b)(4)(ii) of the National Labor Relations Act, and (2) whether in any event such activity is protected by the First Amendment to the Constitution. In support of this motion, it is shown as follows:

1. The second question presented by the Board's petition for a writ of certiorari relates to the lawfulness, under Section 8(b)(4)(ii)(B) of the National Labor Relations Act, of passing out union leaflets to the public requesting consumers not to purchase products of a wholesaler with which the union has a labor dispute. The Board has ruled that the "publicity proviso" to Section 8(b)(4)(B) exempts such handbilling from the proscription of that Section. In disagreeing with the Board's ruling, the court below relied on its earlier decision in *Great Western Broadcasting Corporation v. N.L.R.B.*, 310 F. 2d 591 (C.A.9). AFTRA and NABET were parties respondent before the Board in the latter case, and participated as intervenors in the proceeding before the Court of Appeals for the Ninth Circuit which was instituted by Great Western Broadcasting Corporation (the charging party before the Board) to review the Board's dismissal of the complaint against AFTRA and NABET.

The Ninth Circuit held in the *Great Western* case that the publicity proviso exempts handbilling activity from Section 8(b)(4)(B) of the Act only where the employer involved in the labor dispute is a manufacturer of a physical product. The employer in *Great Western* operated a television station. The Ninth Circuit, however, declined to direct the entry of a remedial order, noting that AFTRA and NABET had advanced the contentions that the handbilling in *Great Western* was lawful irrespective of the applicability of the publicity proviso on the grounds that (1) such activity is constitutionally protected, and (2) the proscription in Section 8(b)(4)(ii) against threats, coercion and restraint did not in any event encompass such handbilling activity. The case was

remanded to the Board for consideration of these questions (Pet. for Cert., 37a).

The *Great Western* case is presently pending before the Board pursuant to the remand order. Briefs of the parties have been filed, but a decision has not been entered.

2. The questions which were formally referred back to the Board in the *Great Western* case are before the Court in the present case. Thus, in resting its decision in this case on the application of the publicity proviso, the Board determined as a threshold matter that the handbilling would constitute threats, coercion and restraint within the meaning of Section 8(b)(4)(ii) of the Act except for the effect of the proviso. The Board made this clear in its decision in the present case, by predicating its ruling as to the handbilling question "on the basis of our recent Lohman Sales Company decision" (R. 38). In *Lohman Sales Company*, 132 NLRB 901, 904, the Board stated, before turning to the applicability of the publicity proviso, that in the absence of the proviso language the handbilling "might constitute restraint and coercion". See also the Board's statement in *Local 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705: "We also agree with [the trial examiner's] finding that, unless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on [the struck radio station], would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that Section." As its Petition indicates (p. 12), the Board considers it an essential premise to its position in this case that Section 8(b)(4)(ii) of the Act would proscribe the handbilling involved here but for the saving language in the proviso. The brief amici curiae of AFTRA and NABET is directed to this premise of the Board's position.

3. Following the decision and remand order of the Court below in this case, the Board filed a Motion for Clarification of Remand in which it requested that the court "make clear that

on the remand, the Board may determine whether the handbilling constituted a threat, restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act, or was constitutionally protected free speech" (R. 101). The court below denied the motion on the ground that these questions were precluded from consideration by Section 10(e) of the Act.* This ruling, which we believe erroneous, required the Board to seek this Court's review without a fuller decisional statement of its views on the two contentions involved, but does not preclude consideration by this Court of the questions to which the contentions are directed.

Thus, as shown above, the Board treated the question of the applicability of Section 8(b)(4)(ii) of the Act as presented on the record before it, and has stated its views both by reference in its decision to the *Lohman Sales Company* case, *supra*, p. 3, and also in other decisions. There is no occasion in these circumstances to invoke the policy of Section 10(e) "of affording the Board opportunity to consider on the merits questions to be urged upon review of its order". *Marshall Field & Co. v. National Labor Relations Board*, 318 U.S. 253, 256. Accordingly, there is "no reason to hold [this Court's] hand at this juncture in order that the Board may arrive again at what is now a foregone conclusion". *Retail Clerks International Association, Local 1623 v. Schermerhorn*, 373 U.S. 746. The applicability of Section 8(b)(4)(ii) in this case presents a threshold issue which is integrally related to the interpretation of the proviso, and which requires consideration, if the Board's position on the proviso is not accepted, in order to resolve the general question presented by the Petition as to the lawfulness of handbilling in the circumstances of this case. Determination of all subsidiary issues encompassed by the question presented is fully appropriate in such circumstances. Compare, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 427-428;

*Section 10(e) provides that: "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Hormel v. Helvering, 312 U.S. 552, 556-557; *Leedom v. I.B.E.W. Local 108*, 278 F. 2d 237 (C.A. D.C.).*

4. In the absence of the proposed brief *amici curiae* dealing with the constitutional and "restraint and coercion" questions, there will be no opposition before the Court to the Board's position respecting these important issues. The interest of respondent in this case coincides with the position of the Board as to these matters. The labor organization which was respondent before the Board in this case did not intervene in the proceeding before the court below, and thus has no standing to intervene before this Court. There has been no indication that any other person or organization seeks to file a brief in opposition to the Board's views. A full statement of the considerations opposing the Board's views should be presented to the Court as to these questions.

5. The Solicitor General has expressed his consent in writing to the filing of the proposed brief. Consent has not been obtained from the respondent.

WHEREFORE, it is respectfully requested that this motion be granted.

September, 1963.

NEYHART & GRODIN
DUANE B. BEESON
Attorneys for AFTRA and NABET.

---

*The appropriateness of consideration by this Court of the constitutional and statutory interpretation problems here involved is emphasized by the fact that closely analogous questions relating to picketing are also before the Court in *National Labor Relations Board v. Fruit & Vegetable Packers*, No. 88, which has been set for argument immediately preceding this case (R. 106).

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 111

NATIONAL LABOR RELATION BOARD,
Petitioner

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amici Curiae for American Federation of Radio and Television Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

OPINIONS BELOW

The opinion of the court of appeals (R. 85-98) is reported at 310 F. 2d 659. The findings of fact, conclusions of law, and order of the Board (R. 36-41) are reported at 133 NLRB 1501.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended. The petition for certiorari was granted on June 10, 1963 (R. 106).

QUESTIONS PRESENTED

The second question presented by the petition for certiorari is whether the handbilling activity in this case is lawful under the National Labor Relations Act, as amended. This brief is restricted to a discussion of the following two subdivisions of this question: (1) whether the handbilling activity in this case is constitutionally protected against restraint by the First Amendment to the federal Constitution, and (2) whether, in any event, the handbilling activity falls outside the proscription of Section 8(b)(4)(ii) of the Act against threats, restraint and coercion.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the First Amendment to the Constitution are set forth in the Appendix, *infra*, p. 31.

STATEMENT

The interest of amici curiae, as stated above, is limited to the ruling of the court below in reversing the Board's determination that the handbilling in this case did not violate Section 8(b)(4)(ii)(B) of the Act. The facts which underlie this phase of the case are uncontested, and may be briefly summarized as follows:

In February, 1960, Wholesale Delivery Drivers and Salesmen Union Local 848, hereafter called the Union, instituted a strike against Servette, Inc., a wholesale distributor of candy, and specialty merchandise in the Los Angeles metropolitan area (R. 18-19; 7, 8, 12). In furtherance of its strike, the Union visited a number of retail markets which handled products distributed by Servette and requested them to discontinue business relations with Servette during the strike. In some instances managers of the retail stores were told that handbills would be distributed in front of their premises if they did not cooperate with the Union. Several stores stopped handling Servette products, and handbills were in fact passed out at stores which continued to do business

with Servette (R. 20-22; 54-72, 76-81). The handbill which was distributed reads as follows (R. 20; 84):

> To the Patrons of This Store
>
> Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.
>
> Brach's Candy
> Servette Candy
> Good Season Salad Dressing
> Old London Products
>
> The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts.
>
> These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.
>
> The drivers of Servette appreciate your cooperation in this fight.

As far as the record shows, the handbilling was at all times orderly, and did not affect deliveries to the retail stores (R. 79).

ARGUMENT

Introductory statement—The Board dismissed the complaint in this case insofar as it pertains to the handbilling activity on the ground that the proviso to Section 8(b)(4) exempts from the proscriptions of that provision the kind of publicity campaign which the Union carried on at the retail stores. Amici curiae agree that the Board has correctly interpreted the proviso, and fully support the Board's position in that respect, as discussed in its brief. We contend, in addition, that there are two alternative reasons for concluding that the Union's handbilling activity is in all respects lawful. We discuss these considerations in this brief.

For purposes of this discussion the handbilling and the Union's warning to market managers that handbills would be distributed if they continued to handle Servette products, may be considered together. Thus, if the distribution of handbills is permissible, it is similarly permissible to advise the persons affected that such distribution will take place. Conversely, it may readily be conceded that, if the distribution is unlawful because it constitutes a coercive threat prohibited by the Act, the warnings would fall for the same reason. As observed by Mr. Justice Holmes in a landmark dissent (*Vegelahan v. Guntner*, 167 Mass. 92, 44 N.E. 1077, 1081):

> "... the word 'threats' often is used as if, when it appeared that threats had been made, it appeared unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence."

Accordingly, the contentions presented below are directed to the lawfulness of the circulation of the leaflets in this case. The answer to the question of distribution will govern as well the question of threating such distribution.

I. The Peaceful Circulation of Handbills Which Identify Persons Who Do Business with a Struck Employer Is Protected by the First Amendment to the Federal Constitution.

A. The Handbilling Activity in this Case Constitutes Freedom of Speech and the Press Within the Meaning of the First Amendment.

Public circulation of leaflets and pamphlets disseminating opinions and information concerning matters of vital public importance occupies a prominent position in the development of the Constitutional liberties protected by the First Amendment. As stated by Mr. Chief Justice Hughes (*Lowell v. Griffin*, 303 U.S. 442, 452):

> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic in defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every source of publication which affords a vehicle of information and opinion . . . 'Liberty of circulating is as essential to that freedom [of expression] as liberty of publishing; indeed without the circulation, this publication would be of little value.'"

See also, *Smith v. California*, 361 U.S. 147, 150; *Jamison v. State of Texas*, 318 U.S. 413; *Talley v. California*, 362 U.S. 60.

It is no longer open to question, moreover, that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill v. Alabama*, 310 U.S. 88, 102, and cases cited. See also, *Thomas v. Collins*, 323 U.S. 506, 532. The *Thornhill* case, in which the principle was initially stated by this Court, involved picketing, and the course of decisional law in the years that followed has made clear that picketing is not in all situations to be equated with constitutionally protected speech. See e.g., *Bakery Drivers v. Wohl*, 315 U.S. 769, 775; *Teamsters Local 695 v. Vogt*, 354 U.S. 284. It is not open to challenge, however, that opinions and facts relating to labor controversies are no less the subject matter of protected free speech than the expression of political and economic views generally. Indeed, fourteen years after the *Thornhill* decision, this Court reversed on the basis of that decision a state court injunction against picketing upon application of an unparticularized statute broadly banning picketing irrespective of the role such conduct might play in "the dissemination of information concerning the facts of a labor dispute". See *Chauffeurs, Teamsters & Helpers Local 795 v. Newell*, 356 U.S. 341.

The aspects of picketing which justify its restraint in some situations, however, do not apply to handbilling directed to the public. Both kinds of labor union conduct may serve the func-

tion of informing the public of the positions of the disputants with respect to a labor dispute, and thus qualify for constitutional protection, but picketing also has "ingredients in it that differentiate it from speech". *Hughes v. Superior Court*, 339 U.S. 460, 465. As explained by the Court in *Bakery Drivers v. Wohl*, 315 U.S. 769, 776:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas that are being disseminated."

In short, picketing may constitute a signal to responsive action on the part of union members generally, who are subject to the discipline of their organizations, or may otherwise have coercive significance apart from communication of facts and opinions. The circulation of leaflets among the public generally, as in the present case, carries no such connotation. Thus, the public was requested by the Union's handbill not to purchase specified products, and an explanation of the Union's position was given. No suggestion can be made, however, that the Union exerted any possible influence upon the recipients of the handbills beyond the persuasive power of the words themselves. Nor does the record show either disorder in the distribution or effect upon the establishments involved in terms of work stoppages or interference with deliveries. The constitutional test must accordingly be applied to the handbills in the case on the basis of what they appear to be on their face. The standards by which picketing might be adjudicated in similar circumstances are not applicable. The distinction is fundamental in constitutional law, for licensing and even lesser forms of regulation of the right to circulate literature are constitutionally forbidden. See, e.g., *Martin v. Struthers*, 319 U.S. 141; *Marsh v. Alabama*, 326 U.S. 501; *Talley v. California*, 362 U.S. 60; cf. *Near v. Minnesota*, 283 U.S. 697. Unlike picketing, therefore, leafleting of the kind involved in the present case must be treated as pure expression under the First Amendment.

It is true, of course, that the handbills in the present case expressed not only the Union's position in the labor dispute, but appealed for public support in withholding patronage from those who handled the products of the struck employer. The principles which protect the circulation of literature, however, do not lose their cogency because the handbills were intended to stimulate sympathetic response to the position of one of the disputants in a labor controversy. This is so even though the success of the response can be measured by an economic loss to the employer involved. Were the rule otherwise, there would be little if any scope for the constitutional protection of free expression. It is seldom that the expression of economic, political, social or other ideas is not at least tacitly accompanied by persuasion to side with the speaker or writer, thereby portending the possibility that pressures will be exerted in support of the views that are being advocated.

The point is made decisively in this Court's decision in *Thomas v. Collins*, 323 U.S. 506. The State of Texas there applied to a speech favoring unionism and soliciting union membership a statute which required all persons who solicited union membership to register and obtain an organizer's card. Texas argued that no question of free speech was presented, because its statute covered only the business activity of union solicitation. 323 U.S. at 526. This Court, however, ruled that a speech which discusses "the advantages and disadvantages of unions and joining them is protected . . . as a part of free speech," and that the exercise of this right could not be curtailed because it implicitly or explicitly invited responsive action on the part of the audience. 323 U.S. at 532. As further explained in the Court's opinion (323 U.S. at 534-535):

> "The speech was an essential part of the occasion . . . And the invitations, both general and particular, were parts of the speech, inseparable incidents of the occasion and of all that was said or done . . . A speaker in such circumstances could avoid the words 'solicit', 'invite', 'join'. It would be impossible to avoid the idea . . . In short, the supposedly clear cut distinction between discussion, laudation, general

> advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn to his intent and meaning . . . Such a distinction offers no security for free discussion . . . The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely."

So here, there is no basis for differentiating between handbilling and protected free speech on the ground that the handbills carried an implicit or explicit appeal to the public for support. If the facts of the Union's dispute with Servette may be freely publicized, including information as to the identity of stores which continued to handle Servette's products, it follows that appeals to support the Union cause by not buying such products during the strike also constitutes activity which is within the scope of the First Amendment. As in *Thomas v. Collins*, in publicizing the names of the retail stores who handled the struck products, "It would be impossible to avoid the idea" that the Union was inviting sympathetic action on the part of the public, for such invitations were "inseparable incidents of the occasion and of all that was said or done". 323 U.S. at 534.

Accordingly, the circumstance that the handbills took the form of an appeal for a withdrawal of patronage as to products involved in a labor dispute does not affect the applicability of the First Amendment. In determining whether the handbilling is within the scope of constitutional protection, therefore, it is appropriate to remind that "only considerations of the greatest urgency can justify restrictions on speech" with which the First Amendment is concerned. *Speiser v. Randall*, 357 U.S. 513, 521. "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis v. United States*, 341 U.S. 494, 510. We turn to the question of whether there is involved in the distribution of handbills in the present case a substantive evil of such proportions as to justify a prohibition of communication.

B. The Possibility That Store Owners May Cease Doing Business With the Struck Employer to Avoid a Withdrawal of Consumer Patronage Caused by Handbilling Does not Provide a Permissible Reason to Prohibit Communication.

1. *The possibility that the store owners will suffer loss of patronage*—The contention that Congress could validly inhibit the Union's distribution of handbills in this case necessarily rests upon the possibility that members of the public, having been informed by the handbills, may choose not to patronize the stores which handle Servette's goods, and thereby create an economic pressure upon such stores to cease doing business with Servette. It may readily be conceded that the foregoing possibility exists. Indeed, it is not likely to be denied that the Union hoped for a public response to its handbilling activity that would demonstrate to the store owner that continued handling of Servette goods during the strike was not profitable. The economic loss, however, which the store owner may suffer in these circumstances—and it does not advance analysis to call it economic coercion—does not justify curtailment of the activity which occasions it. To conclude otherwise would be to condition the protection of the First Amendment upon a showing that the speech or writing could not be effectual, a view that scarcely expresses confidence in the concept of freedom of expression which is written into our fundamental law.

We do not suggest that Congress is generally forbidden to regulate conduct in the field of labor relations which is calculated to interfere with selling and buying. The Labor Act's prohibition against work stoppages to induce an employer to cease doing business with another employer with whom a union has a labor dispute is a familiar example of permissible regulation. And, as this Court has made clear, encouragement of this kind of economic pressure upon employers not directly involved in the dispute is not immunized from governmental restraint because it is accomplished by written or oral communication. *I.B.E.W. v. National Labor Relations Board*, 341 U.S. 694; Cf. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490.

Pressures of this nature, however, are altogether different in constitutional contemplation that those which result from an uncoerced and free response of the consuming public, acting upon their independent predilections in response to information made available to them by handbills. As we have shown, the communications which are challenged in the present case, are not signals to action, or incidents of a program to be carried out by persons subject to the discipline of the Union. The handbills have done no more than feed information respecting a particular labor dispute into the market place of ideas and opinions of persons who may or may not be interested. In legal effect, the activity is no different than the promotion by labor organizations of a "Buy Union Label" campaign. Such a general appeal, unaccompanied by control over responses of those to whom the appeal is made, may or may not result in persuading a sufficient number of consumers to take a stand that will bring about a diminution of profits by non union businesses. The vagaries interacting ideas and attitudes toward labor disputes, however, has never been thought sufficient to preclude a free exchange of ideas on the ground that consumers may, in consequence of the message conveyed to them, withhold patronage from one or another seller of goods. In *Talley v. California*, 362 U.S. 60, for example, handbilling was carried on to induce a consumer boycott against a group of merchants, but the economic hurt was not considered a factor for disallowing constitutional protection. Cf. *Terminiello v. Chicago*, 337 U.S. 1, 4. "Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts . . ." *Thomas v. Collins*, 323 U.S. 516, 537. And as observed by this Court in *Wood v. Georgia*, 370 U.S. 375, 389, "Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assemble."

Accordingly, the constitutional impediment to restraint of the handbilling activity in this case is not circumvented even if it

were to be assumed (but see *infra*, pp. 23-30), that its consequence was economic "coercion" or "threats" within the meaning of those words as used in Section 8(b)(4)(ii) of the Act. There is no escape for any person or any business from "coercion" resulting from differing responses to a free and open discussion of labor disputes, short of stopping discussion altogether. This, we submit, cannot constitutionally be accomplished by governmental action.

It should be noted that the court below has reached the same conclusion in a case involving facts closely analogous to those in the present case. Thus, in *National Labor Relations Board v. I.A.M., Local 942*, 263 F. 2d 796 (C.A.9), a labor organization published a newspaper in which it placed on its "We Do Not Patronize" list the name of an employer which refused to recognize the union and enter into a union security agreement with it on the ground that the union did not represent a majority of its employees. The newspaper was circulated throughout the community, particularly to union members. The Board concluded that the distribution of the "We Do Not Patronize" list constituted an unfair labor practice in that it brought economic pressure to bear upon the employer and its employees, thus constituting restraint and coercion with respect to the question of employee organization. The court of appeals, however, rejected the Board's reasoning, and adopted instead that of the Trial Examiner who determined that the circulation of the "We Do Not Patronize" list was protected by Section 8(c) of the Act, the so-called "free speech" provision.[1] Quoting from the Trial Examiner's Report, because the Court was "so impressed with his reasoning", the opinion states (263 F. 2d at 799):

---

1. Section 8(c) provides that "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, or graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

As this Court has noted, Section 8(c) serves the function in the Act of "safeguarding freedom of speech". *National Labor Relations Board v. Denver Building Trades Council*, 341 U.S. 675, 690.

> "It is true that business operations employing union labor will be preferred by some customers and avoided by others solely upon the basis of that factor . . . So it may well be said that the selection of a union representative is often or perhaps always made in a climate not entirely free from elements which have a coercive quality. These elements are a part of the very fabric of industrial and commercial life quite beyond the reach of any conceivable statutory remedy."

The Court concludes, following the foregoing quotation, that (263 F. 2d at 799):

> "We consider the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the First Amendment guaranteeing freedom of speech."

In the light of the foregoing, Sherman Act cases in which this Court has declined to exempt handbilling from its finding of illegal boycott activity on the part of labor organization officials have no application in the present situation. Thus, in *Gompers v. Bucks Stove*, 221 U.S. 418, and *Loewe v. Lawlor*, 208 U.S. 274, the Court rested its findings of illegal conspiracies in restraint of trade on strike activity which included, in part, the publication of boycott notices against firms which did business with the struck employers. The Court's conclusion, however, was based on the circumstance that the notices constituted directives issued to labor organizations and their members to exert boycott pressures as part of an overall conspiracy, worked out within the context of internal union agreement and discipline. As stated in *Gompers v. Bucks Stove, supra*, 31 Sup. Ct. at 497, "In the case of an unlawful conspiracy, *the agreement to act in concert when the signal is published* gives the words 'Unfair', 'We Do Not Patronize', or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have" (emphasis added). The principle in such cases is the same as that recognized more recently in *I.B.E.W. v. National Labor Relations Board*, 341 U.S. 694, 701, 705, i.e., that

expressions "amounting to 'bare instigation'" of work stoppages in violation of prohibitions against secondary boycotts "carries no unconstitutional abridgement of free speech".

This principle, however, has no application where, as here, there is no "signal" aspect to the circulation, but rather simply an effort to persuade members of the public at large, who are quite beyond the scope of the Union's control, to exercise their individual and independent choices in patronage in a manner that will support the Union's cause. The distinction was made explicit in a concurring opinion of Chief Justice Stone in a Sherman Act case which succeeded the decisions discussed above. Thus, referring to notices distributed by a union which accused a manufacturer of beer of being unfair, and requested the public not to purchase the "unfair product" (necessarily from businesses not directly involved in the dispute), Chief Justice Stone remarked (*United States v. Hutcheson*, 312 U.S. 219, 243):

> "Publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by Act of Congress."

The present case thus is not one involving an organized interference with the business of the retail stores through an exercise of economic power subject to the control of the Union. It is rather one involving the dissemination of information and appeals to passersby whose separate responses are neither controlled nor predictable, but will at least be informed by the contents of the handbills. It is the function of the First Amendment to protect the right of advocates to so inform the public, even where the public's response may incur economic hardship.

2. *The possibility that the store owners may cease doing business with Servette*—The cessation of business between store owners and Servette that occurred in this case is attributable to the same interacting consumer forces that are, or are thought to be, responsible for whatever economic pinch which the retail

stores might have felt as a result of the handbilling. The constitutional principles discussed above thus apply with equal force to defeat the argument that such a cessation of business justifies governmental restraint. If a labor union is free to identify to the public the products of an employer with whom it has a labor dispute, that freedom necessarily overrides, if it is to be at all meaningful, considerations based on radiating disruptions of normal business relationships which may result from a discriminating exercise by members of the public of their power of patronage.

It may be contended, however, that the cessation of business between the employer who is primarily involved in a labor dispute and those who are not has been made an illegal labor union objective by Section 8(b)(4)(B) of the Act, and that Congress is constitutionally entitled to forbid the use of free speech in attaining unlawful objectives. Of course, the Constitution does not immunize incitement to the commission of a criminal act. See, e.g., *Fox v. Washington*, 236 U.S. 273. Nor can oral or written expressions escape restraint if they constitute an "integral part of conduct in violation of a valid . . . statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490. The handbills in the present case, however, sought no disobedience of law. It is entirely lawful for the public to withhold patronage of firms which do business with an employer whose employees are on strike, even though the public thereby influences such firms to cease handling the struck products. It is also lawful for the retail stores in this case to cease doing business with Servette during the strike, whether voluntarily or in response to consumer pressure. As stated by this Court (*Local 1907, Carpenters Union v. National Labor Relations Board*, 357 U.S. 93, 99-100):

> "A boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute. Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains

from the specifically prohibited means of coercion through inducement of employees."[2]

Accordingly, it is not enough to defeat the constitutional protection of handbilling in this case to argue that the Union activity was in furtherance of an unlawful objective. Congressional policy in this area of the law does not make a blanket condemnation of a cessation of bussiness relations in consequence of labor controversies. Nor would such a step be constitutionally permissible so as to authorize the proscription of the free flow of information and discussion concerning the dispute in the uncontrolled public market place of ideas. If avoidance of interference with business between a struck employer and neutral employers is a legitimate legislative objective, regulation must nonetheless stop short of censorship of publications relating to the strike. As pointed out by Chief Justice Stone (see p. 19, *supra*) the Constitution protects the distribution of notices that an employer involved in a labor dispute is "unfair". This constitutional guarantee is not so evanescent as to apply where the employer sells his products at retail, but not where he sells them at wholesale and a withdrawal of consumer patronage would necessarily affect a "neutral" retail business, and perhaps prompt the latter to cease handling the products involved. The short of the matter is that statutory protection which Congress may afford to normal business intercourse between employers involved in labor disputes and others cannot realistically reach the pressures which the public exerts in such situations, nor can it impede free access to information which may promote such pressures without undercutting the constitutional freedom of discussion which underlies our system of government.

---

2. For the reasons stated in the Board's brief in this case relating to the first question presented, the 1959 amendments to the Act do not affect the continuing applicability of this statement of the law, except to the extent that the neutral employer is now protected against other forms of coercion in addition to that of work stoppages. It is not open to question, however, that a retail store is free to cease handling products in deference to consumer "coercion", whether based on disapproval of the quality of the product or sympathy for a union involved in a labor dispute.

It is well to recall that the concept of free speech incorporated into the First Amendment was formulated against the background of pamphleteering which was in many respects like the handbilling involved in this case. The quarrel of colonial America was with England, and particularly with its restrictive tax impositions. A principal method of American patriots to protest England's actions, however, was to encourage the public to boycott colonial merchants who imported English goods. Handbilling to "brand with public infamy" anyone who imported English wares preceded the Boston Tea Party, and thereafter documents were circulated elsewhere in the colonies "threatening all who dealt in dutied tea with a severe social and economic boycott". Rayback, J. G., *A History of American Labor* (MacMillan, 1959) pp. 29-30, 32. The colonial merchants, no less than the retail stores in the present case, might in one view be described as neutrals to the primary controversy, but we do not believe that the Constitution was written to guaranty their protection against the effect of open discussion and the circulation of written ideas respecting the primary controversy, whatever the consequences to them in terms of consumer pressure.

Ultimately, the question in this kind of case must come down to whether the Constitution countenances governmental rules which deny the public access to information concerning the identity of persons who trade with employers with whom there is a labor dispute. As we have shown, no line, either practical or constitutional, may be drawn to separate the dissemination of such information from appeals to support the union cause. The possible consequences of free and open discussion to the businesses involved in terms of potential loss of profits must thus be balanced against the interests of our society in obtaining information and the views of the disputants. We think it clear that the First Amendment has struck the balance in favor of open discussion.

II. The Handbilling in This Case in Any Event Is Not Within the Proscription of Section 8(b)(4)(ii)(B) of the Act.

A. The Statutory Provisions Involved.

In relevant part, Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union:

> "to threaten, coerce, or restrain any person ... where ... an object thereof is: ... forcing or requiring any person to cease doing business with any other person."

As shown in the Motion, *supra*, p. 3, the Board has ruled that the foregoing language would be applicable to the Union's handbilling activity in this case except for the proviso which immunizes "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer ..." We show below that, wholly apart from the effect of the proviso, the Union's peaceful handbilling in this case did not in any event "threaten, coerce, or restrain any person" within the meaning of these statutory words, and thus cannot be found an unfair labor practice.

In turning to the reasons which support this interpretation of Section 8(b)(4)(ii), however, it is appropriate to keep in mind the nature of the constitutional issues which would be created by a contrary interpretation. In view of these issues, every effort should be made to construe the statutory language "in the candid service of avoiding a serious constitutional doubt". *United States v. Rumely*, 345 U.S. 41, 47.

B. The Statutory Interdiction Against Threats, Coercion and Restraint Does Not Reach the Union's Handbilling Activity.

Upon the assumption that the statutory reference to threats, coercion and restraint includes every economic pressure to which a business may be subjected by union activity in a labor controversy, there would be little room for argument that the handbilling in this case did not fall within the proscription of Section

8(b)(4)(ii) of the Act. This assumption, however, cannot be made. Unsophisticated literalism forms "a hazardous basis for the explication of major legislative enactments" (*Local Lodge No. 1424 v. National Labor Relations Board*, 362 U.S. 411, 417-418, n.7), particularly those which are "the result of conflict and compromise between strong contending forces and deeply held views . . ." *Local 1976, Carpenters v. National Labor Relations Board*, 357 U.S. 93, 99.[3]

Indeed, the selection of the statutory words "threaten, coerce or restrain" was not made with the thought of using commonplace language in its ordinary meaning, nor were the words originated with the adoption of Section 8(b)(4)(ii) in 1959. They were patterned after the proscription in Section 8(b)(1) of the Act against union "restraint or coercion" which had been adopted in 1947. It was the intention of Congress in 1959 that the newly added language in Section 8(b)(4)(ii) should be given the same interpretation as the similar language in the pre-existing provision.

Thus, the language in question first appeared in the administration bill, S. 738, which was one of several bills introduced in the 86th Congress to amend the Act.[4] In explaining its import during hearings on the bill, Secretary of Labor Mitchell stated to the Senate Subcommittee on Labor that "prior interpretations" under Section 8(b)(1) of the Act "will be extended to those provisions of the proposed bill". Hearings, Subcommittee on Labor on Bills Pertaining to Labor-Management Reform, 86th Congress, 1st Sess., p. 410. Accordingly, the scope of the terms "threaten, coerce, or restrain" must be delineated in terms of decisions which have interpreted the provision from which these words were taken.

The leading and definitive case in point is *National Labor Relations Board v. Drivers Local 639*, 362 U.S. 274. The question

3. See also Judge Learned Hand's warning that "There is no surer way to misread any document than to read it literally". *Guiseppi v. Walling*, 144 F.2d 608, 624 (concurring opinion), aff'd 324 U.S. 244.

4. See Vol. I, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, (hereafter referred to as Leg. Hist.) p. 142.

in that case was whether the "restrain or coerce" language of Section 8(b)(1)(A) of the Act proscribed peaceful picketing to compel the commission of an unfair labor practice by the employer, i.e., recognition of a labor organization as the exclusive representative of his employees at a time when it had not been so designated by a majority of the employees. The Board argued that recognition of a union in such circumstances constituted an obvious and literal restraint upon the exercise by the employees of their right of free choice with respect to their representation. This Court rejected the contention, admonishing against applying "the vague language [of Section 8(b)(1)(A)] to the limits which, read literally, the words might permit." *National Labor Relations Board v. Drivers Local 639*, 362 U.S. 274, 291-292. It was the Court's conclusion that this language, read in the light of the limited problem to which it was addressed, was confined to "union tactics involving violence, intimidation, and reprisal or threats thereof". 362 U.S. at 290. See also, *National Labor Relations Board v. Lodge 942, I.A.M.*, 263 F. 2d 796, 800, holding that it would require "a clearer mandate from Congress than the general terminology of [Section 8(b)(1)(A)]" to find that peaceful circulation of a "We Do Not Patronize" list was forbidden by the Act. The lesson of these decisions is that peaceful union activity of the kind involved in this case is not within the pale of the language which Congress selected in Section 8(b)(4)(ii) of the Act.

The legislative history of Section 8(b)(4)(ii) confirms the foregoing conclusion. The language of this provision was included in the administration bill, S. 748, and also in the bill which was passed by the House. The Senate bill, as reported and passed by the Senate, did not amend the pre-existing language in this respect. Statements by the supporters of the proposed amendment during the Congressional debates evince an intent to protect neutral employers from threat of strike action, as well as from strong arm tactics, but there was no expression of an

intent to cover peaceful non-picketing communication.[5] On the contrary, there was general acknowledgment during the debates that Section 8(b)(4)(ii) was not intended to reach traditional modes of free speech. Thus, when Congressman Griffin was asked on the floor of the House about the application of the proposed amendment to appeals made at the customer entrances of stores, he replied (105 Daily Cong. Rec. 14339, II Leg. Hist. 1615): "Of course, this bill and any other bill is limited by the constitutional right of free speech". Similarly, Congressman Kearns, addressing himself to a proposal containing the same language now under consideration, stated (105 Cong. Rec. A 4308, II Leg. Hist. 1750):

> "In addition, a ban is placed on 'threats, coercion, or restraint' of any person where the object is one of those proscribed by Section 8(b)(4), and contracts which cause an employer to engage in a secondary boycott are outlawed. Thus peaceful persuasion of secondary employers would be permitted but could not be carried to the point of threat or made part of a contract. The line drawn is the one between peaceful persuasion by the union and 'strong arm' tactics." (Emphasis supplied.)[6]

From the foregoing, it is apparent that peaceful handbilling was not intended to be included within the scope of the phrase "threaten, coerce or restrain". It has been contended, however, that the publicity proviso to Section 8(b)(4) (see p. 23, *supra*), which was added in 1959, evinces a different intent on the part of Congress. Although there is no express support for the posi-

5. The following statements are illustrative:

Senator Goldwater (105 Daily Cong. Rec. 5764, II Leg. Hist. 1079):

> "Threats of a strike or picketing made directly to an employer can be effective as the strike or the picketing itself."

Analysis of the Landrum-Griffin proposal submitted by Congressman Griffin (105 Daily Cong. Rec. 13092, II Leg. Hist. 1523):

> "This bill makes such coercion [threats against neutral employers of a 'strike or other economic retaliation'] unlawful."

6. It is also significant that Congressional proposals to broaden the coverage of Section 8(b)(4)'s language to include "economic coercion" and "inducement" of neutral employers were defeated. See II Leg. Hist., pp. 1193-1198, 105 Daily Cong. Rec. 3510-3511.

tion in the legislative history, the point of the argument is that by excepting certain kinds of peaceful publicity from the scope of Section 8(b)(4)(ii), Congress meant to prohibit all such publicity that didn't satisfy the proviso. The argument necessarily makes the false assumption that any and every form of publicity directed against neutral firms which handle struck products in a labor dispute involves threats, coercion and restraint.

In any event, the argument that the proviso implies that Section 8(b)(4)(ii) includes peaceful handbilling cannot be supported. The legislative history of the publicity proviso shows that its adoption was to emphasize and clarify the limited scope of the "threaten, coerce, and restrain" language, and not to provide an indirect means of broadening that language. Thus, the history of the proviso is traceable to a nation-wide address by President Eisenhower during the debate on the 1959 amendments to the Act in which he proposed a ban against picketing at a retail store in furtherance of a dispute with a manufacturer whose products were sold by the retail store.[7] Upon recognizing that the bill passed by the House could be construed to cover such picketing, the Senate conferees insisted that a proviso be added to Section 8(b)(4) to make clear that unions were at least free to use non-picketing means of communication at the neutral's premises in the kind of situation mentioned in the President's speech. This history of the adoption of the proviso has been explained by Archibald Cox, now Solicitor General of the United States, who worked closely with the Senate Committee during the legislative consideration of the 1959 amendments (44 Minnesota Law Review, 57, 274):

> "Standing alone, as it did in the Landrum-Griffin bill, this language seemed to invite rulings that organizing a consumer boycott of a store which sold the products of a manufacturer with whom the union was engaged in a labor dispute would become an unfair labor practice. A majority of

7. The President's address is reported in II Leg. Hist. 1842.

the Senate Conferees objected to this change in the law. There is some reason to think that originally the Republicans and Southern Democrats among the House Conferees failed to realize that the words were broad enough to reach consumer boycotts and would have agreed to eliminate the prohibition but President Eisenhower's radio and television appearance placed them in a dilemma. The speech contained an example of secondary picketing which had either to be read as inducement of employees to engage in a secondary strike, in which case the President had displayed ignorance by demanding that Congress outlaw conduct which had been unlawful for twelve years, or a demand for a law against picketing which caused a secondary consumer boycott. The sponsors of the Landrum-Griffin bill stood immovably upon the second alternative. The Senate Conferees, therefore, sought to narrow the restriction to the exact illustration used by the President. This is the reason for the proviso which permits unfair lists, radio broadcasts, newspaper advertising, sound trucks and every other form of publicity except picketing for the purpose of inducing consumers to boycott an unfair product or a distributor who does business with an unfair producer. It is qualified by the distinction which we noted in Section 8(b)(7) between appeals to individuals as members of the public, whether union members or not, and concerted refusals to work backed by the pressure and possibly the discipline of an organized group. I suspect that the distinction between signal and publicity picketing would have been introduced if it were not for the curious turn of events which made it politically impossible for the sponsors of the Landrum-Griffin amendments."

As the foregoing commentary indicates, the proviso was intended to be illustrative of the situations which Congress did not wish to include within the "coerce or restrain" language of Section 8(b)(4)(ii), i.e., peaceful communications identifying to consumers the persons who were doing business with an employer with whom a union had a primary labor dispute. The proviso was referred to as a "clarification", rather than a comprehensive description of the situations to which Section 8(b)(4)(ii) did not

apply. See 105 Daily Cong. Rec. 17181, II Leg. Hist. 1454; 105 Daily Cong. Rec. 16539, II Leg. Hist. 1712. The same point underlies the explanation of the proviso made to the Senate by President Kennedy, who at that time was Chairman of the Senate Subcommittee on Labor. Thus, President Kennedy, stated on the floor of the Senate before passage of the Conference Agreement (105 Daily Cong. Rec. 16254-16255, II Leg. Hist. 1388-1389):

> "Secondly, the House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites . . . Under the language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth."

See also, President Kennedy's statement at 105 Daily Cong. Rec. 16414, II Leg. Hist. 1432:

> "We were not able to persuade the House conferees to permit picketing in front of that secondary shop [which sold goods of a manufacturer with whom there was a labor dispute], but we were able to persuade them to agree that the union shall be free to conduct informational activity, short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site."

For other statements acknowledging that the proviso was intended to exemplify rather than restrict the situation in which non-picketing appeals could be made, see 105 Daily Cong. Rec. A8274, II Leg. Hist. 1823; 105 Daily Cong. Rec. 16637, II Leg. Hist. 1722.[8]

---

8. The use of a proviso to clarify existing law is not an unusual phenomenon in the 1959 amendments to the Act. Thus, a proviso was also added to Section 8(b)(4)(B) to make it clear that a primary strike and primary picketing are lawful. As the decisions had established, and as Congress well knew, this proviso did not except from the Act conduct that otherwise would have been covered. See *Local 761, I.U.E., v. National Labor Relations Board*, 366 U.S. 667, 672.

It is thus apparent that the publicity proviso was adopted to erase any fear that Section 8(b)(4)(ii) might apply in situations where, as here, unions advertise by peaceful non-picketing methods the fact that specified neutral employers are doing business with a primary employer. The circumstances surrounding the adoption of the proviso therefore support the interpretation of the language in question as established by the decisions relating to Section 8(b)(1)(A). See pp. 24-25, *supra*. To construe the statutory language more broadly would extend the clause "threaten, coerce or restrain" to cover peaceful communications that it was not designed to cover, and would derogate the spirit and purpose of the clarifying proviso. Compare, *Drivers Local 639 v. National Labor Relations Board*, 362 U.S. 274.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Union's handbilling activities in this case cannot be found to constitute an unfair labor practice, irrespective of the applicability of the proviso to Section 8(b)(4)(B). Accordingly, the judgment of the court below should be reversed with directions to affirm the order of the Board insofar as it dismisses those portions of the complaint dealing with handbilling activity.

September, 1963

NEYHART & GRODIN
DUANE B. BEESON

Attorneys for Amici Curiae American Federation of Radio and Television Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

(Appendix Follows)

Appendix

The relevant provisions of the Constitution of the United States are as follows:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government of a redress of grievances.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8 . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

* * * * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other

employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 17 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1963
No. 111

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Objection by Respondent, Servette, Inc., to Motion for Leave to File a Brief Amici Curiae by American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

HILL, FARRER & BURRILL,
CARL M. GOULD,
STANLEY E. TOBIN,
MALCOLM A. MISURACA,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for Servette, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases	Page
Great Western Broadcasting Corporation v. N. L. R. B., 310 F. 2d 591	5, 6
Honeyman v. Hanan, 300 U. S. 14	4
Knetch v. United States, 364 U. S. 361	3
Parker v. County of Los Angeles, 338 U. S. 327	4
Partenweederei, MS Belgrano v. Weigel, 313 F. 2d 423	2
Rescue Army v. Municipal Court, 331 U. S. 549	3, 4
United States v. Hayman, 342 U. S. 205	4
United States v. Singer Mfg. Co., 374 U. S. 174	3
Rules	
United States Supreme Court Rules, Rule 42, Sec. 1	3
Statutes	
National Labor Relations Act, 8(b)(4)	5
National Labor Relations Act, Sec. 8(b)(4)(ii)	1
National Labor Relations Act, Sec. 10(e)	2, 3



IN THE

Supreme Court of the United States

October Term 1963
No. 111

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Objection by Respondent, Servette, Inc., to Motion for Leave to File a Brief Amici Curiae by American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Servette, Inc., begs leave of this Honorable Court to object to the Motion for Leave to File a Brief Amici Curiae by the American Federation of Television and Radio Artists, San Francisco Local, and the National Association of Broadcast Employees and Technicians, Local 55.

The sole issue before this Court with respect to Section 8(b)(4)(ii) of the National Labor Relations Act is whether a boycott by a union of neutral parties is

exempted from violating the Act by virtue of the second proviso to that section. Amici Curiae seek to raise two additional questions, to which Respondent objects on the following grounds:

1. Neither question is timely raised to the Court in accordance with its long-standing rule that issues shall come to the Court only after they are orderly adjudicated in the courts below.

The court of appeals in this case ruled in response to a motion for clarification filed by the National Labor Relations Board that these issues were not properly before the court. They were raised neither by the Board in its opinion nor by either party to the court of appeals in briefs or argument. The court stated that "the first intimation of such grounds in the instant case was raised on the motion for clarification." [R. p. 105; 313 F.2d 66, 67.] Amici Curiae are incorrect in suggesting that the court refused to consider these questions solely on the ground of Section 10(e) of the Act. Before noting the applicability of that section, the court relied on its holding in *Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423 (9th Cir. 1962), in which the court ruled:

> It is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal, nor, a fortiori, as herein, in a petition for rehearing on appeal. This requirement sets the scope of the lawsuit, thereby preventing piecemeal litigation and consequent waste of the time of both trial and appellate courts. It assures that the opposing party will know the claims he must meet. It gives the appellate court

> the benefit of the district court's wisdom, and it prevents a litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below.

(313 F.2d 423, 425.) Clearly, Amici are in error in asserting that the court below primarily grounded its refusal to consider these questions on Section 10(e) of the Act. That court quite properly held that the failure to present these issues prior to the motion for clarification precluded their consideration. Manifestly, then, even greater reasons argue against this Court's entertaining these questions now.

See also,

Rescue Army v. Municipal Court, 331 U. S. 549 (1947);

United States v. Singer Mfg. Co., 374 U. S. 174, 175 n. 1 (1963).

2. Amici Curiae should not be allowed to inject into this case issues not raised by the parties.

Amici Curiae concede that neither the National Labor Relations Board nor the Respondent has raised to the Court the issues that Amici seek to raise. (Motion for Leave to File a Brief Amici Curiae, p. 5, par. 4.) Briefs amici curiae are not favored by the Court (United States Supreme Court Rules, Rule 42, Section 1); and in any event Amici Curiae should not be allowed to inject new issues into this case. *Kretch v. United States*, 364 U. S. 361, 370 (1960).

3. The asserted constitutional question is premature and not timely raised, and thus does not conform to this Court's policy against unnecessary consideration of constitutional issues.

The question whether a boycott is illegal does not raise a first amendment issue. If it did, every case involving the construction of a statute prohibiting boycotts—the Sherman Act, for example—would present a free speech issue. This Court has repeatedly held that it will not for the convenience of the parties anticipate constitutional issues even where they might otherwise have been properly raised. *United States v. Hayman,* 342 U.S. 205 (1952); *Parker v. County of Los Angeles,* 338 U.S. 327 (1949); *Honeyman v. Hanan,* 300 U.S. 14 (1937). This Court analyzed its policy in *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947), when it stated, at page 570:

> Moreover the policy is neither merely procedural nor in its essence dependent for applicability upon the diversities of jurisdiction and procedure, whether of the state courts, the inferior federal courts, or this Court. Rather it is one of substance, grounded in considerations which transcend all such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure.

4. Moreover, the factual record in this case makes the argument of Amici Curiae in regard to the "coercion" issue moot.

Even if the arguments advanced by Amici Curiae were otherwise properly before this Court, their position that handbilling and threats thereof do not *per*

se constitute "coercion" within the meaning of Section 8(b)(4) is misplaced. Not only do both the Board and Respondent disagree with Amici Curiae on this point, but the stipulated facts in the record in this case show that the Union's actions did have a direct and detrimental economic effect on neutral parties, thus placing this case in a different posture than *N.L.R.B. v. Fruit & Vegetable Packers, No. 88,* and rendering the argument of Amici Curiae in this regard inapplicable.

(5) The very questions raised by Amici Curiae are before the National Labor Relations Board in another action and await decision in the orderly process of judicial administration.

Amici Curiae are parties to N. L. R. B. Case No. 20-CC-234, which is presently before the National Labor Relations Board upon remand by the Court of Appeals for the Ninth Circuit to the Board for its consideration of the issues raised by Amici Curiae. *Great Western Broadcasting Corporation v. N. L. R. B.*, 310 F.2d 591 (9th Cir. 1962).

Amici Curiae not only attempt to anticipate those issues here, but to circumvent their consideration by the National Labor Relations Board and the Ninth Circuit Court of Appeals in the *Great Western Broadcasting* case.

The foregoing considerations present the Court with several substantive reasons for denying leave to Amici Curiae to file their brief. In this case the presenta-

tion of their issues would be untimely and would prevent the Court from having the wisdom and judgment of the lower courts. In *Great Western Broadcasting,* the lower courts would be deprived of their usual function, to hear and judge these issues in the orderly course of judicial administration.

Wherefore, Respondent respectfully requests that the motion be denied.

Dated: October, 1963.

HILL, FARRER & BURRILL,
CARL M. GOULD,
STANLEY E. TOBIN,
MALCOLM A. MISURACA,
By STANLEY E. TOBIN,
Attorneys for Servette, Inc.

SUBJECT INDEX

	Page
Questions presented	1
Statutes involved	2
Statement of the case	2
Summary of argument	5
Argument	11
I.	
The union's efforts to induce and encourage various store managers of neutral employers to cease handling goods distributed by Servette and to refuse to perform services for their employers is plainly in violation of Section 8(b)(4)-(i)(B) of the act	11
A. The plain meaning of the language of Section 8(b)(4)(i)(B) compels that conclusion reached by the court below; that section clearly includes "any individual" and does not exclude supervisors or similar managerial employees from its scope	11
B. The legislative history of Section 8(b)-(4)(i) patently shows that congress expressly intended that supervisors or similar managerial employees be included within the language "any individual"	13
C. Contrary to petitioner's assertion the store managers did not have the authority to determine whether or not to continue doing business with Servette	20

II.

The labor board improperly failed to find that the union violated Section 8(b)(4)(ii)(B) of the act by falsely handbilling various stores doing business with Servette 23

A. The publicity proviso to Section 8(b)(4) does not protect the handbilling on the part of the union as against Servette, a distributor 23

B. The exception proviso is not applicable at any rate if the union's handbilling had the effect of inducing certain store managers to cease doing business with Servette 29

C. The proviso to Section 8(b)(4) protects only truthful publicity; the handbilling in the instant case was clearly false and misleading 30

Conclusion 32

Appendix. Pertinent provisions involved ....App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Adams Express Co. v. Kentucky, 238 U. S. 190	12
Addison v. Holly Hill Fruit Products, 322 U. S. 607	25
Border Pipe Line Co. v. Federal Power Commission, 171 F. 2d 149	26
Bugajewitz v. Adams, 228 U. S. 585	13
Burr & Perfection Mattress & Spring Company v. NLRB, 321 F. 2d 612	24
Business Service Employees v. Gazzam, 339 U. S. 532	24
Creek County v. Sabler, 318 U. S. 705	13
Duplex Co. v. Deering, 254 U. S. 443	27
Great Western Broadcasting Corp. v. NLRB, 310 F. 2d 591	27
Helvering v. New York Trust Co., 292 U. S. 455	12
International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.), 132 NLRB 901	23, 32
Kitty Kelly Shoe Corp. v. Retail Employers, 125 N.J. Eq. 250, 5 A. 2d 682	24
Local 505, International Brotherhood of Teamsters, etc. (Carolina Lumber Company), 130 NLRB 1438	11, 20
Local 560, International Brotherhood of Teamsters, 127 NLRB 1327	23
Mason and Dixon Lines v. Odom, 193 Ga. 471, 18 S.E. 2d 841	24
Osaka Shosen Kaisha Line v. United States, 300 U. S. 98	12
Piedmont & N. R. Co. v. I.C.C., 286 U. S. 299	25

Page

Spokane & Inland Empire R. Co. v. United States, 241 U. S. 344 25

Spring City Foundry Co. v. Commissioner, 292 U. S. 182 13

Teamsters Local 695 v. Vogt, 254 U. S. 284 24

United States v. Atchison T. & S. F. Ry. Co., 220 U. S. 37 26

United States v. Hill, 248 U. S. 420 12

United States v. Montgomery Ward & Co., 150 F. 2d 369 28

Upholsterers Frame & Bedding Workers, etc. (Minneapolis House Furnishings Co.), 132 NLRB 40 ..... 11, 19, 21

Miscellaneous

105 Congressional Record 15906 August 28, 1959 .. 26

105 Congressional Record 16416 (September 3, 1959) 26

105 Congressional Record 16589 15

105 Congressional Record 17882 16

105 Daily Congressional Record 5580, April 17, 1959 16

108 Daily Congressional Record 9717 (June 5, 1962) 25

13 Labor Law Journal 355 (May, 1962) 14, 25

I Legislative History, p. 965, 86th Congress, First Session, Sept. 10, 1959 16

II Legislative History, p. 1037 16

II Legislative History of the Labor Management and Disclosure Act of 1959, pp. 1382-1383 15

II Legislative History, p. 1383, Col. 1 26

Page

II Legislative History, p. 1434 26

II Legislative History, p. 1426 16

II Legislative History of the Labor Management and Disclosure Act of 1959, pp. 1520-1523 (G.P.O. 1959) 14

II Legislative History, pp. 1706-1707 15

Statutes

Fair Labor Standards Act of 1938, Sec. 7(a)(2) .. 28

National Labor Relations Act, Sec. 2(11) 6, 17, 18

National Labor Relations Act, Sec. 8(b)(4) 6, 8, 10

National Labor Relations Act, Sec. 8(b)(4)(A) 6, 12, 23

National Labor Relations Act, Sec. 8(b)(4)(i) 1, 6, 7, 11, 12, 17, 18, 20, 21, 22

National Labor Relations Act, Sec. 8(b)(4)(i)(B) 5 ..... 13, 18, 22, 23, 24, 25, 26, 29, 30, 32

National Labor Relations Act, Sec. 8(b)(4)(ii).... ..... 1, 7, 8, 10, 17, 18, 20

National Labor Relations Act, Sec. 8(b)(4)(ii)-(B) 23

57 Statutes at Large, pp. 163, 166 28

61 Statutes at Large, p. 136 2

73 Statutes at Large, p. 519 2

United States Code, Title 29, Sec. 151 2

Textbooks

44 Minn. L. Rev. 257, 270 (1959), Cox, The Landrum-Griffin Amendments to the National Labor Relations Act 17

Restatement of the Law of Torts, Sec. 779, comments (f)-(i) 23

IN THE

Supreme Court of the United States

October Term, 1963
No. 111

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR SERVETTE, INC., RESPONDENT.

Questions Presented.

1. Whether a labor union's inducing and encouraging supervisors, store managerial employees of retail chain markets, not to perform services for their employers or handle goods distributed by another employer with whom the union has a dispute violates Section 8(b)(4)(i) of the National Labor Relations Act.

2. Whether a labor unions's handbilling at neutral retail chain markets urging consumers not to purchase products produced by neutral producers and, in some instances, distributed by another employer with whom the union has a dispute, as part of the union's campaign to promote a boycott by dealers and consumers of such products, violates Section 8(b)(4)(ii) of the National Labor Relations Act.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*), are set forth in the Appendix, *infra*.

Statement of the Case.

Servette is a distributor of specialty merchandise in the area of Los Angeles, California [R. 4]. Kory's Markets, Inc., McDaniels Markets and Daylight Markets (hereinafter referred to as Kory's, McDaniels and Daylight) separately operate a substantial number of chain markets in the greater Los Angeles area [R. 71]. In early February 1960, as a result of a labor dispute with Servette, the Wholesale Delivery Drivers and Salesmen's Union, Local No. 848 engaged in a strike against Servette and picketed Servette's warehouse located in Los Angeles [R. 74-75]. From February 3 through March 10, 1960 the Union, in support of its strike against Servette, engaged in a campaign "to enlist the aid and cooperation of retail markets handling and stocking the products distributed by Servette in the [Union's] strike against Servette, and to promote a boycott by dealers and consumers" of said products [R. 75]. As part of this campaign, the Union sought to enlist the aid of Kory's, McDaniels and Daylight to cease doing business with Servette, its agents engaging in the following conduct and practices:

1. Told the store manager of McDaniels Market No. 14 that the Union had a labor dispute with Servette. Asked him to cooperate by not dealing with Servette and by taking Servette's merchandise off his shelves [R. 55-56]. Told him that if he failed to cooperate they would pass out handbills to customers [R. 55-57].

Handbills were passed out in front of the store but the manager continued his purchases from Servette. The handbills passed out at this market, as well as at other markets herein mentioned, read as follows [R. 84; 54-55]:

"To the Patrons of This Store

Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.:

* Brach's Candy
* Servette Candy
* Good Season Salad Dressing
* Old London Products

The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual 'Yellow Dog' contracts.

These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of Servette appreciate your cooperation in this fight."

2. Asked the store manager of McDaniels Market No. 18 to remove merchandise distributed by Servette from his shelves. The store manager told the Union representative that he, the manager, "would have to get permission" from his superior [R. 63-64]. At a meeting of the store managers of McDaniels, the managers were told by company officials "to try to get along with both sides and to do as they wished" [R. 63]. The manager of McDaniels Market No. 18 either re-

duced his purchases from or ceased doing business with Servette (*ibid.*).

3. Requested the store manager of McDaniels Market No. 25 not to handle Servette's merchandise. He replied, "I'll see what I can do". He was shown a copy of the handbill and thereafter either diminished or terminated his dealings with Servette [R. 63-64].

4. Requested the store manager of Daylight Market No. 3 to cooperate with them in their dispute with Servette by not handling Servette's products, and told him they were passing out handbills to customers of those markets which refused to cooperate [R. 57-58].

5. Told the store manager of Kory's Market No. 6 of the dispute with Servette, showed a copy of the handbill to him, and told him that the handbills would be passed out to his customers unless Kory ceased doing business with Servette. After the store manager said "he would have to check with the main office about getting Servette's merchandise out of the store," handbills were passed out to customers. The next week the manager refused to allow the Servette driver to stock his shelves. On two subsequent occasions, agents visited this market to ascertain whether or not Servette's merchandise was on display [R. 59-61].

6. Passed out handbills at Kory's Market No. 5 [R. 61-63].

7. Asked the store manager at Kory's Market No. 1 if he would cooperate by removing Servette's products from his shelves. The store manager said he would have to ask advice from his "supervisor". Handbilling occurred at this market on two different occasions [R. 64-65].

8. Passed out handbills to the customers of Kory's Market No. 2 and told the store manager that they would stop handbilling if he would cease handling Servette's products [R. 66-67].

9. Passed out handbills to customers of Kory's Market No. 3 [R. 69-70].

The Union's business agent testified that as part of the campaign against Servette the Union distributed these handbills at the customer entrances to well over 50 retail chain supermarkets in the greater Los Angeles area and the evidence here with respect to Daylight, McDaniels and Kory's covers only three of the chains where handbilling occurred [R. 76-78].

Handbilling occurred at certain of the markets above mentioned which purchased Good Season Salad Dressing and Old London Products not from Servette but from Certified Grocers of Southern California, another distributor not involved in the labor dispute existing between Servette and the Union [R. 55-56; 61-62; 65; 66-69].

Summary of Argument.

I.

A. Prior to the enactment of the Landrum-Griffin Amendment in 1959 to the National Labor-Management Relations Act, labor organizations were prohibited from inducing or encouraging "employees of any employer" to engage in "a strike or a refusal in the course of their employment to use, * * * or otherwise handle * * * any goods * * * or to perform any service," with an object of "forcing * * * any employer" to cease doing business with any other person. The legislative history of Section 8(b)(4)(i)-

(B) to the 1959 amendment showed the clear intention of Congress to close the recognized "loophole" that then existed in Section 8(b) (4) (A) of the Act. Because the language that existed in 8(b)(4)(A) applied only to "the employees of any employer", the prohibition contained therein did not cover the inducing or encouraging of certain individuals who are not technically "employees" within the statutory definition of the Act.

Particularly, as supervisorial or managerial employees are not "employees" within the definition of Section 2(11) of the Act, unions, prior to 1959, could, with impunity, induce the supervisors of a secondary employer to refuse to handle the goods of a primary employer with whom the union had a dispute. Congress considered the technical omission of supervisors as an illogical "loophole", and, accordingly, in enacting Section 8(b)(4)(i), deliberately substituted the phrase "any individual employed by any person". There can be no question, therefore, that store managers of retail food market chain stores are supervisors and clearly "individuals" within the meaning of Section 8(b)(4)(i) and, consequently, the union's activity to induce or encourage such individuals for the forbidden objects listed in Section 8(b)(4) is violative of the Act.

B. The Board, however, has sought to rewrite the Landrum-Griffin Act to conform to its own unique concept of congressional purpose. In seeking to justify its own theory, the Board has misread not only the clear language of the statute but the intention of Congress.

Contrary to Petitioner's assertions, there is no inconsistency between Sections 8(b)(4)(i) and 8(b)(4)(ii). The former provision prohibits a union from inducing and encouraging individuals employed by a corporation or a partnership or other person to engage in the enumerated activities. Essentially, Congress sought to prevent this kind of pressure from being brought upon anyone but sole proprietors, partners or corporate officers. Section 8(b)(4)(ii), on the other hand, is aimed at threats or coercion against those sole proprietors, partners and corporate officers who "as owners" of the enterprise are the persons excluded from Section 8(b)(4)(i). Reading the provisions in this fashion is not only in concert with the intent of and language utilized by Congress, but avoids the unwarranted assumption of law making authority on the part of the Petitioner.

C. Petitioner, undoubtedly cognizant of the obvious intent of Congress to include supervisors within the scope of the word "individual", has, with sleight-of-hand, shifted from the theory advanced by it in dismissing the instant complaint and in enunciating its position in prior Board cases. Now Petitioner's entire argument is premised on the alleged fact that these store managers had the authority, on their own and as part of their delegated duties, to decide whether to continue doing business with Servette. The uncontradicted facts in the record completely undermine this, the Board's new theory. The evidence is overwhelming to the effect that these store managers, when approached by the

union for these prohibited objectives, were without authority to make such decisions on their own, but instead they had to turn to their superiors or supervisors to determine what was to be done under the circumstances. Indeed, the evidence not only fails to support the Board's present position but completely contradicts it.

II.

A. In addition to arguing that an individual is not an individual, the Board further argues that a distributor is a producer of products. Like the Procrustean bed, if the traveler is too long you cut off his feet, if he is too short you stretch him a bit.

Congress, in enacting Section 8(b)(4)(ii) of the Act, sought to prevent secondary boycotts except in limited situations and then only with specific safeguards to innocent persons. The Petitioner admits that the union's handbilling in this case would otherwise violate Section 8(b)(4)(ii), but for the exception or second proviso to Section 8(b)(4). Both the prohibition and the exception, involving controversial legislation concerning secondary boycotts, are hedged and limited by carefully chosen words of art. And the exception clearly states that "publicity, other than picketing" is permitted if directed to show to the public that "a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer". The plain and simple fact is that the union here had no dispute against a producer of products, that Servette does not produce any

products but rather is a distributor of products. Had Congress sought to extend the protection of the proviso to the extent the Board urges rather than having limited it to situations where a product or products are produced by a primary employer and distributed by another, it would have used appropriate language to that effect. But instead, Congress chose to reject statutory language presented to it which would have extended the scope of the proviso to include distributors as well as producers. Furthermore, the class of employers covered by the exception proviso is further restricted by the additional statutory provision that the employer must be one who produces products capable of distribution. Certainly Servette does not fall into that definition.

There is involved in this case, therefore, no "unfair" product. Under the Board's unbridled interpretation of the language of the exception, the Union can do exactly what the Board admits the 1959 Amendment sought to prohibit: It can spread the labor dispute throughout the community by putting pressure upon neutral parties having nothing whatsoever to do with the Union's grievance.

B. The Union's handbilling fails to obtain the protection of the exception proviso for a further reason: A number of store managers in this case refused to continue business with Servette because of the handbilling. Consequently, a further express limitation to the exception proviso was violated. The Union admitted that it was engaged in a campaign to promote a boycott by

dealers and consumers of products distributed by Servette. To the extent it was successful in inducing store managers not to distribute, handle or resell goods distributed by Servette, the Union's activity not only was plainly violative of Section 8(b)(4)(ii) but cannot possibly be protected by the exception proviso.

C. For still another reason the Union's handbilling was outside the protection of the proviso to Section 8(b)(4). These handbills, which were passed out by union representatives in front of the various retail markets, stated that various named products were distributed by Servette. The evidence shows that at least some of those products were distributed to these stores by another distributor who had no connection whatsoever with the dispute between the Union and Servette. The public was, therefore, mislead into believing that Servette distributed all these products to these stores. The prerequisite in the proviso is that the publicity be "truthful". In this case the false and misleading statements by the Union injured an innocent party. It is clear that Congress sought to protect innocent and neutral parties and the Union's activity is, therefore, expressly excluded from protection of the proviso.

ARGUMENT.

I.

The Union's Efforts to Induce and Encourage Various Store Managers of Neutral Employers to Cease Handling Goods Distributed by Servette and to Refuse to Perform Services for Their Employers Is Plainly in Violation of Section 8(b)(4)(i)(B) of the Act.

A. The Plain Meaning of the Language of Section 8(b)-(4)(i)(B) Compels That Conclusion Reached by the Court Below; That Section Clearly Includes "Any Individual" and Does Not Exclude Supervisors or Similar Managerial Employees From Its Scope.

The upshot of Petitioner's contention is that the language "any individual employed by any person" in Section 8(b)(4)(i) of the Act does not apply to certain individuals. More specifically, the Board, based upon the rationale of its prior opinions interpreting 8(b)-(4)(i),[1] held in this case that certain so-called "high level" supervisory employees are not "individuals" and that therefore the inducing and encouraging by the union of various store managers of retail food market chain stores is not in violation of the Act. The Board presumably would declare that the same activity by the Union would be illegal if and to the extent it were

---

[1]The Board in this case found no violation of 8(b)(4)(i) solely for the reasons set forth in *Local 505, International Brotherhood of Teamsters, etc. (Carolina Lumber Company)* 130 NLRB 1438 (1961) and *Upholsterers Frame & Bedding Workers, etc., (Minneapolis House Furnishings Co.)* 132 NLRB 40 (1961) [R. 37]. In those cases the Board held that Section 8(b)(4)(i) applies to the inducement of a low, but not high, level supervisor.

directed to so-called "low level" supervisorial or managerial employees. The crux of the Board's argument is, then, that Congress did not truly mean "any individual" when it used that term but rather meant to include only certain individuals; nor did it intend to include all supervisory employees, but only certain undefined types of supervisors. In so interpreting the phrase "any individual", the Board not only does violence to the plain meaning of that language but ignores both Congressional intent and fundamental precepts of statutory construction.

A statute is not always open to construction but only where the language used in the statute requires interpretation, that is, where the statute is ambiguous or will bear two or more constructions, or is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning; there is no occasion for resorting to the rules of statutory interpretation, and the court will not look for or impose another meaning. In the absence of ambiguity, it is the established policy of courts to regard the statute as meaning what it says, and to avoid giving it any other construction than its words demand. See, generally, *Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98 (1937); *Helvering v. New York Trust Co.*, 292 U. S. 455 (1934); *United States v. Hill*, 248 U. S. 420 (1919); and *Adams Express Co. v. Kentucky*, 238 U. S. 190 (1915).

Prior to the 1959 Amendment of the Act, Section 8(b)(4)(i) (then 8(b)(4)(A)) applied to "the employees of any employer". The 1959 Amendment

changed the language to read "*any individual employed by any person* engaged in commerce or in an industry affecting commerce" (emphasis added). It is apparent that the 1959 Amendment made a material and significant change in the language of that provision. In making material changes in the language of a statute, the legislature cannot be assumed to have regarded such changes as without significance but must be assumed to have had a reasonable motive. Where a statute is amended it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. On the contrary, the presumption is that every amendment of a statute is made to affect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology raises a presumption and indicates persuasively that a departure from the old law was intended, and accordingly the amendment is generally construed to affect the change, particularly where the wording of the statute is radically different. *Creek County v. Sabler*, 318 U. S. 705 (1943); *Spring City Foundry Co. v. Commissioner*, 292 U. S. 182 (1934); *Bugajewitz v. Adams*, 228 U. S. 585 (1913).

B. The Legislative History of Section 8(b)(4)(i) Patently Shows That Congress Expressly Intended That Supervisors or Similar Managerial Employees Be Included Within the Language "Any Individual".

Buttressing the precise, unambiguous language of the 1959 Amendment is the clear and expressed intent of the Congress. That Congress sought to include supervisors such as the store managers involved in this case within the prohibition of Section 8(b)(4) was

made clear throughout the Congressional proceedings. Congressman Griffin, in explaining the provisions of the Landrum-Griffin Bill to Congress on July 27, 1959, gave a detailed analysis of the bill where he stated:[2]

> "Present law provides that it is unlawful for a union to induce or encourage 'employees of any employer' to engage in a strike or 'concerted refusal' to do their work for one of the forbidden objects listed in Section 8(b)(4)—such as to force their Employer to cease doing business with a 'primary employer.' Since farm laborers, railway labor and supervisors are not 'employees' within the meaning of the Act, unions may now, without penalty, induce them to engage in secondary boycotts. This bill corrects this by changing the word 'employees' in the phrase quoted above to 'any individual employed by any person.' This change appears in clause 4(i)."

Then Senator Kennedy, who as Chairman of the Conference Committee had a great deal to do with the interpretation of the legislation, submitted for the record an analysis of the legislation here involved on behalf of himself, Senators McNamara, Morse, and Randolph.

---

[2]Legislative History of the Labor Management and Disclosure Act of 1959, Vol. II, pp. 1520-1523 (G.P.O. 1959). In 1962 Representative Griffin issued a statement regarding the National Labor Relations Board's emasculation of the Congressional intent in passing the 1959 Amendment:

"In short we clearly sought to prohibit a union from inducing 'any individual employed by any person' to engage in a secondary boycott. But now we find . . . the Labor Board literally deciding in recent decisions that in some circumstances an 'individual' is not 'individual'. Admittedly, this takes quite a bit of doing, but this the Labor Board has done . . ." 13 Labor Law Journal 355 (May, 1962).

There he stated, in an explanation of the proposed compromise of Title VII (under the heading "Secondary Boycotts and Hot Cargo"), "The proposal completely accepts the basic House position. Specifically the proposal would: 1. . . . 4. Prohibit secondary boycotts by supervisory employees."[3]

In explaining this change, then Senator Kennedy and Representative Thompson, his conference associate, submitted an analysis of the differences between the House and Senate bills before the Conference Committee with the following comment:[4]

> "In some industries supervisors belong to the union of the rank-and-file workers or as ex-members are sympathetic to it. Occasionally a union has induced the supervisors of a secondary employer to refuse to handle the goods of some primary employer with whom the union had a dispute. This conduct causes a true secondary boycott but it does not violate section 8(b)(4)(A) because section 8(b)(4)(A) forbids only the inducement of 'employers' and supervisors are not 'employers' within the statutory definition.
>
> "* * *
>
> "The House bill would extend the prohibition to inducement of supervisors. The present omission is an illogical loophole which should be closed if any legislation dealing with secondary boycotts is enacted. The substance of the House bill is therefore acceptable upon this issue."

---

[3]II Leg. Hist. 1382-1383.

[4]105 Cong. Rec. 16589; II Leg. Hist. 1706-1707.

Senator Morse, one of the conferees on the part of the Senate, who spoke in favor of the conference bill's provision, stated:[5]

> "There are many instances also where a secondary boycott is conducted by a union agent going to a supervisor of employees, who often is a union member, and inducing him to shut off deliveries. Since the supervisor is subject to union discipline, such inducement would be clearly as effective as though inducement were applied to employees, themselves."

Senator Humphrey stated, as follows:[6]

> "[T]he amendment proposed by the Senator from Arizona [Mr. Goldwater] would change the words 'employees of any employer' to 'any individual employed by any person' and would delete the word 'concerted' * * *
>
> "As it now stands, section 8(b)(4) does not prohibit appeals or requests directed to supervisory or managerial employees because these individuals are not employees within the statutory definition. But they are surely individuals; and to substitute the word 'individual' for the word 'employees' would place requests and appeals to them within the prohibition of the law."

In the Senate Committee analysis of this change, it is stated:[7]

---

[5] 105 Cong. Rec. 17882; II Leg. Hist. 1426.

[6] Remarks of Senator Humphrey on the Goldwater amendment, 105 Daily Cong. Rec. 5580, April 17, 1959, II Leg. Hist. 1037.

[7] Senate Committee Analysis, Committee print, Subcommittee on Labor and Public Welfare, United States Senate, 86th Congress, First Session, Sept. 10, 1959, I Leg. Hist. 965.

Similarly, Archibald Cox, Royal Professor of Law at Harvard Law School, wrote that the new provision "obviously"

> "The present law bans the inducement of employees of a secondary employer when the object thereof is to cease doing business with another employer. The revision includes the following features * * *. (2) Inducement of a single employee or a supervisor employed by a secondary employer is banned. * * *"

The store managers in this case are certainly supervisors within the meaning of the Act.[8]

The Board, however, by seeking to establish two categories of supervisors, not only creates a type of division that finds absolutely no support in the Act, the statute or its legislative history but further requires, as pointed out by the court below, that a different construction be given to the phrase "any person engaged in commerce" appearing in Section 8(b) (4) (i) than is accorded to the same phrase appearing in Section 8(b)(4)(ii). Even more seriously, however, the dubious theory advanced by the Board would make the enforcement of the prohibition unduly troublesome and confusing. Labor organizations, furthermore, would

---

encompasses supervisors. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Re. 257, 270 (1959)

[8]Section 2(11) of the Act defines a supervisor as

"* * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

be placed in the untenable and precarious position of risking the commission of unfair labor practices without knowing which "supervisors" of an employer are "high level" and which are "low level", that is, which ones are individuals and which are not, which possess the undefined authority including them within Section 8(b)(4)(i) and which do not. Thus, a union, for example, may at one time urge that certain individuals are supervisors within the meaning of Section 2(11) of the Act for the purpose of a representation election but that these same individuals are not to be considered as supervisors for the purposes of an unfair labor practice though the definition of supervisor in Section 2(11) of the Act applies in both instances. It must be assumed that members of Congress were aware of that definition throughout the Congressional proceedings surrounding the 1959 Amendment and did not intend to create such an unrealistic dichotomy.

The Petitioner argues that only its interpretation of the word "individual" permits a reasonable construction of Section 8(b)(4). But the intent of Congress as expressed in Section 8(b)(4)(i) and (ii) is not rendered inconsistent by according the language of these provisions its plain meaning. It is clear that what Congress intended to do in Section 8(b)(4)(i) was to prohibit unions from inducing or encouraging individuals employed by a corporation or a partnership or other person to engage in the enumerated activities. Essentially, Congress sought to prevent this kind of

pressure from being brought upon anyone but sole proprietors, partners or corporate officers.[9] On the

---

[9]It is submitted that Congress specifically intended to include "supervisors" within the definition of "individuals" employed by any person but probably intended to exclude corporate officers, who though technically employees, are actually thought of as "the employer". This position has been taken and spelled out in the Intermediate Report in *Upholsterers Frame & Bedding Workers, etc.* (Minneapolis House Furnishing Co.) 132 NLRB 40, 66 (1961), which states:

> "While most, but not all corporate officers are 'supervisors' as the term is defined in Section 2(11) of the Act, there is, in customary parlance, a distinction between a supervisor and a corporate officer. A supervisor is an agent of management and in that sense is management but a corporate officer is management or top management or the employer even without thinking in terms of agency. It is our opinion that Congress did not intend 'individual' in subparagraph (i) to include corporate officers. From time to time, as we have seen from the legislative history cited herein, Congress referred to and used the term 'the employer' or "the secondary employer' and made it clear that the prohibition or threats, coercion, and restraint was primarily intended to protect 'the employer' from such direct approach. This was true although employers obviously operated through policymaking officials and, except for proprietors and partners, the top officials or corporate officers, were the one whose policy was affected by threats, coercion and restraint. But, with respect to inducement under subparagraph (i), it is our opinion that Congress did not envisage or seek to prohibit inducement or encouragement, short of threats and coercion (otherwise taken care of) of the employer, including corporate officers. The basic loyalty of the employer and its officers to its ideals and economic interest in continuing a satisfactory business relationship with another employer was presumed. The discussion in Congress was confined to situations where, through threats and coercion, the secondary employer was forced to sever his business relationship with another employer. The remaining danger to the secondary employer was that through calling a strike of his employees or inducing them not to work the union might accomplish its purpose. This was original Taft-Hartley concept. The amendments proceeded on basically the same premise, except that it was believed that a much wider variety of employees as well as single employees and 'supervisors' should be insulated from inducement. Supervisors, below the corporate officer level, were, at least in some cases, believed to be susceptible to inducement, either because they were generally closer to

other hand, it is reasonably clear that Section 8(b)(4)(ii) is aimed at threats or coercion against those sole proprietors, partners and corporate officers who as "owners" of the enterprise are the persons excluded from Section 8(b)(4)(i). It certainly does no mischief to the statute to interpret its provisions in this fashion and obviously is in concert with the intent of and the language utilized by the Congress.

C. Contrary to Petitioner's Assertion the Store Managers Did Not Have the Authority to Determine Whether or Not to Continue Doing Business With Servette.

Obviously aware that both the language and intent of Congress are contrary to the theory advanced by the Board in dismissing the instant complaint and in enunciating its position in *Carolina Lumber* and *Min-*

---

employees or might hold union cards or entertain some degree of union sympathy in a particular factual situation. In any event, they were not in the same position as the employer himself, i.e., the corporate officers, who would yield presumably only when threats or coercion were brought to bear.

In further support of the foregoing conclusions, it is to be noted that the original Taft-Hartley language, aside from the substitution of 'individual' for 'employees' was retained and this language was peculiarly pertinent to employees and employee action and to those below the corporate officer level even under the amendment. Subparagraph (i) speaks in the same context, of engaging in a strike or inducing or encouraging individuals to engage in a strike or refusal to work. We are not persnaded that the foregoing is the type of conduct reasonably expected to be directed to corporate officers or that a union expects that corporate officers can be so induced. Supervisors, below the officer level, however, as we have explained, have at least the potential, even if remote and probably varying with their level of supervision, of being thus induced. In any event, we are convinced from both the term 'individual employed' and from specific references to supervisors and their inducement as stated by Members of Congress, that supervisors below the officer level are included in the term 'individual'."

neapolis House Furnishing Co., supra, the Board now attempts to abandon that rationale and instead to assert that the appeals to the store managers were not prohibited by Section 8(b)(4)(i) because these supervisors allegedly had the authority, solely, on their own, and as part of their delegated duties, to decide whether to continue doing business with Servette (NLRB Brief, pp. 2, 8, 13-26). It is quite apparent that Petitioner's entire argument must now either rest or fall on this allegation. The undisputed facts in evidence, however, show beyond contention that none of the store managers had any such delegated duty or authority. *Indeed, the uncontradicted evidence is all to the contrary:* At the time the Union sought to induce them not to handle goods distributed by Servette or to perform services in connection therewith, none of the store managers, on his own, could effectively make the policy decisions as to whether to continue doing business with Servette or other distributors; nor did any of them formulate the purchasing or selling policies of their employers.

Some of these store managers gave uncontradicted evidence that they had to seek advice from their superiors when approached by the Union agents. When the store manager at Kory's Market No. 6, was approached by two representatives from the Teamsters No. 848 and told not to handle Servette-distributed merchandise, he stated that he "would have to check with the main office about getting Servette merchandise out of the store" [R. 59]. The manager of McDaniels Market No. 18, testified that when three Teamster representatives approached him and asked him to take Servette merchandise off the shelves, he said that he

would have to get permission from his superiors [R. 63].[10] The manager of Kory's Market No. 1, stated, when similarly requested to take Servette merchandise off the shelves, "I will check with my supervisor" [R. 65]. Obviously, in light of this record, the argument of the Board in this regard is totally unwarranted and untenable.

It is apparent, therefore, that as a matter of law these store managers are supervisors within the meaning of the Act and therefore are included within the term "any individual" in Section 8(b)(4)(i); and as a matter of fact, there is no evidence that at the time the union representatives violated Section 8(b)(4)(i) these store managers had any authority "to select the sources of goods bought for resale" or to decide whether to continue to handle goods distributed by Servette. The subtle change in the Board's theory from that advanced by it in dismissing the complaint can be of no avail. The undisputed facts are clearly contrary to the Board's present position.[11]

---

[10]The evidence shows that this manager, in response to the union representatives' appeals to him to take Servette merchandise off the shelves, told them that he would have to get permission. *Thereafter*, "at a meeting of managers of some kind they [the store managers] were told by company officials to try to get along with both sides and do as they wished". [R. 63]. This is the only "evidence" that would indicate any store manager had any "authority" of the kind attributed to him by the Board. The *most* this testimony shows, however, is that at the time the Union representatives appealed to that manager he had *no* authority whatsoever and had to ascertain what to do in this regard from his superiors.

[11]Even by the Board's standards the burden of proof in a Section 8(b)(4) situation as to whether a supervisor is not an individual within the meaning of that provision is on the party urging this escape route. In the instant case the union utterly failed to present a single fact which would sustain its burden that the store managers referred to above were not individuals within even the Board's definition of that term. The

II.

The Labor Board Improperly Failed to Find That the Union Violated Section 8(b)(4)(ii)(B) of the Act by Falsely Handbilling Various Stores Doing Business With Servette.

A. The Publicity Proviso to Section 8(b)(4) Does Not Protect the Handbilling on the Part of the Union as Against Servette, a Distributor.

The Board in its Decision and Order recognized and in its brief concedes the Union's handbilling constituted restraint and coercion by the terms of Section 8(b)(4)(ii)(B) of the Act, but, relying upon its prior reasoning in *International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)*, 132 NLRB 901 (1961), held that such handbilling was protected by the exception proviso to Section 8(b)(4) of the Act [R. 38].

The proviso to Section 8(b)(4) does not protect the handbilling of the Union in this case.[12] That proviso states:

Board has held in *Local 560, International Brotherhood of Teamsters*, 127 NLRB 1327 (1960):

> "As we stated in *Detroit Edison*, once the General Counsel has established that persons employed by a third-party employer have been induced or encouraged for unlawful objects, it rests upon the respondent to produce evidence that these individuals were supervisors and not employees. Only if such evidence is produced is the specific inducement removed from the interdiction of the Act. The Respondents in the instant case have failed to produce such evidence."

The rule as set forth in the above case, though involving former Section 8(b)(4)(A), is equally applicable in the instant situation, and the Board should not be allowed initially to engraft an exception to the all-inclusive word "individual" and then, blithely, ignore that exception.

[12]The parties have assumed that handbilling in front of the retail stores was not "picketing" within the meaning of the proviso. There is considerable authority, however, to the effect that handbilling at a *locus in quo* is picketing. See Restatement of Torts, Sec. 779, Comments f through i; *Kitty Kelly Shoe*

"That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of *truthfully* advising the public, including consumers and members of a labor organization, that *a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer,* as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." (Emphasis added.)

As the dissenting member of the Board noted, that proviso "contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette does not produce any products." [R. 38].

Had Congress sought to extend the protection of the proviso to the extent that the Board urges rather than limiting its scope to situations where a *product* or *prod-*

Corp. v. Retail Employers, 125 N.J. Eq. 250, 5 A. 2d 682, 684 (1939); *Mason and Dixon Lines v. Odom*, 193 Ga. 471, 18 S.E. 2d 841, 844 (1942). Cf. *Teamsters Local 695 v. Vogt*, 254 U. S. 284, 289 (1957); *Business Service Employees v. Gazzam*, 339 U. S. 532, 537 (1950). If handbilling in these circumstances is properly to be considered as picketing, then, of course, the exception proviso to 8(b)(4) would not be applicable in any situation where handbilling was conducted at the situs of the secondary employer, as in this case. See also *Burr & Perfection Mattress & Spring Company v. NLRB*, 321 F. 2d 612, 621-22, (5th Cir. 1963).

ucts are *produced* by a primary employer and *distributed* by another employer, it would have used appropriate language to that effect. But in light of the fact that throughout Section 8(b)(4) and in the proviso itself Congress carefully used such terms as "services", "distribute", "distribution", "products", "producer", "processer", "manufacturer", and "transport", it is obvious that it meant to limit the scope of the exception proviso to Section 8(b)(4).[13]

That proviso is an exception to the basic and general rule that Congress considered paramount, that is, to prevent this type of secondary boycott. The exception should, therefore, be strictly construed. *Spokane & Inland Empire R. Co. v. United States*, 241 U. S. 344, 350 (1916); *Piedmont & N. R. Co. v. I.C.C.*, 286 U. S. 299, 312 (1932); *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 638 (1944). The legislative history of this provision reinforces that sound rule of law.[14]

The broad scope of coverage of the proviso which the Board is urging was actually presented to but not

---

[13]Representative Thompson (who along with then Senator Kennedy was one of the principal drafters of the final version of the 1959 legislation) has stated that since those matters legislating secondary boycotts are controversial; such language adopted "is hedged and limited by carefully chosen words of art." 108 Daily Cong. Rec. 9717 (June 5, 1962.)

[14]The Congressional intent in this regard is further evidenced by a recent statement of Congressman Griffin on the proviso to 8(b)(4):

> "The proviso states a *very limited exception* to a general rule. That exception, which is spelled out precisely in the proviso, provides that *where the primary employer is the producer of a product, and that product is distributed by another*—or secondary—employer, the union may truthfully publicize the fact by means other than picketing, so long as the publicity does not affect the performance of services at the establishment of the secondary employer." 13 Labor Law Journal 355 (May, 1962) (Emphasis added).

accepted by the Congress. At the time the Senate and House Conferees were attempting to resolve the differences between their respective bills, the then Senator Kennedy introduced to, and had placed upon the calendar of, the Senate a resolution which instructed the Senate Conferees to insist upon the inclusion of certain provisions in the conference agreement. Included in the provisions dealing with the amendments to Section 8(b)(4) was the following proviso:[15]

> "Provided, That nothing contained in this subsection (b) shall be construed * * * to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, *or goods are produced or distributed* by an employer engaged in a labor dispute. * * * (Emphasis added)."

The Board in its Brief (p. 35) could see no significance in the fact that the above language was presented to but not adopted by the conference committee. It is submitted that the fact that Congress selected the *restrictive* language that it did rather than the more inclusive language which was presented by the Senate conferees is certainly significant and exemplifies congressional intent.[16]

---

[15]105 Cong. Rec. 15906 August 28, 1959), II Legis. Hist. 1383, Col. 1; 105 Cong. Rec. 16416 (September 3, 1959); II Legis. Hist. 1434.

[16]Compare *Border Pipe Line Co. v. Federal Power Commission* 171 F. 2d 149, 152 (D.C. Cir. 1948) where the Federal Power Commission asked the court "to read the statutory definition as though it contained the phrase originally included but later eliminated by Congress in the legislative course of the Act." The court refused, stating, "This we cannot do. We cannot write into an act of Congress a provision which Congress affirmatively omitted." See also *United States v. Atchison T. & S. F. Ry. Co.*, 220 U. S. 37, 44-45 (1910).

The Board's argument mentions only two of the three critical words in the proviso (NLRB Brief, pp. 27-28). The Board ignores the statutory requirement that the proviso apply only to "products", "produced" by Servette *and* "distributed" by another employer. In glossing over the actual language of the proviso, the Petitioner attempts to create an ambiguity where none exists. As the court below noted in *Great Western Broadcasting Corp. v. NLRB*, 310 F. 2d 591, 600 (9th Cir. 1962), the proviso refers only to "those who produce a product or products. This class of employers is further defined and restricted by the additional provision that the employer must be one who produces products capable of distribution". Patently, the wholesaling activities of Servette produced nothing capable of distribution.

Congress undoubtedly considered it proper to permit unions to "follow the product" so as to inform the public that a producer of a product is allegedly failing in some way to meet the standards, requirements or desires of the union with regard to that product. Petitioner recognizes this concept, though in a distorted form (NLRB Brief, pp. 31-34). The fact is that the Union in this case did not follow "unfair" products. See *Duplex Co. v. Deering*, 254 U. S. 443, 483, 488 (1920) (Brandeis, J., dissenting opinion). Rather, what the Union did was to follow a product of innocent manufacturers, distributed by another distributor (Certified Grocers of Southern California) as well as Servette to many neutral retailers [R. 88-89]. Permitting a boycott of these products does exactly what the Board admits the draftment of the 1959 Amendment sought to prohibit (NLRB Brief, p. 33): It spreads the labor dis-

pute throughout the community by putting pressure upon neutral parties, adversely affecting both manufacturers and sellers who become innocent victims of a labor dispute. The proviso certainly is not and was not meant to be a license to boycott the product of a producer having nothing whatsoever to do with the Union's grievance. Accordingly, therefore, Congress properly and carefully selected and approved the language which is now incorporated within the proviso.

The weakness of the Board's position is further exemplified by its reliance upon cases involving the Fair Labor Standards Act (NLRB Brief, p. 29). Such authorities cannot be used to support the Board's contention here because (1) the critical words are not the same in each statute, (2) they are not used in the same context, and (3) as the Board concedes, the Fair Labor Standards Act contains a detailed definition of "produced." Petitioner's use of *United States v. Montgomery Ward & Co.*, 150 F. 2d 369 (7th Cir. 1945) as a holding not based on express statutory definitions as the Fair Labor Standards Act cases is a contrived attempt to mislead this Court. The *Montgomery Ward* decision expressly rests on the fact that the statute before the court, the War Labor Disputes Act, directs that:

> "In making any such decision the [National War Labor] Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; * * *" Sec. 7(a)(2), 57 U. S. Stats. 163, 166.

Rather than supporting Petitioner's argument, this case demonstrates that when Congress wanted to incorporate the definitional standards of a different statute it knew how to do it.

B. The Exception Proviso Is Not Applicable at Any Rate if the Union's Handbilling Had the Effect of Inducing Certain Store Managers to Cease Doing Business With Servette.

There is a further condition imposed by the second proviso to Section 8(b)(4) for permitting publicity other than picketing in these situations. Such activity is permitted ". . . as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, *or not to perform any services,* at the establishment of the employer engaged in such distribution; . . . ." (Emphasis added). And the plain, undisputed facts in the record show that some store managers refused to continue doing business with Servette because of the handbilling and threats thereof. Thus, another specific limitation, carefully and specifically included in the statute by Congress, necessarily must be a barrier to the Union's right to engage in such activity and to the Board's sanctioning such activity.

The evidence shows that the store manager of Kory's Market No. 6 refused to allow goods distributed by Servette to be stacked in the racks in his store after Union representatives requested him not to handle such merchandise, showed him a copy of the handbill and passed out handbills at the front entrance to the store [R. 59-60]. The manager of McDaniels Market No. 25 was also requested by agents of the Teamsters Local 848 not to handle products distributed by Servette and was shown a copy of the handbill which the Union had prepared for distribution in the Los Angeles area. The

store manager then either diminished or terminated his business with Servette [R. 63-64]. Counsel for the Union admitted that the Union was engaged in a campaign "to enlist the aid and cooperation of retail markets handling and stocking the products distributed by Servette in the Respondent's [Union's] strike against Servette, *and to promote a boycott by dealers and consumers of products.* That is all admitted. . . ." [R. 75].

In this campaign the Union was, as the undisputed evidence above shows, partly successful. To the extent that it was successful in inducing "any individual employed by any person", that is, the store managers employed by the retail food market chain stores, "not to perform any services, at the establishment of the employer engaged in such distribution", that is, to refuse to distribute, handle or resell goods distributed by Servette, the Union's acts, and specifically the handbilling, for that additional reason were outside the protection afforded by the proviso to 8(b)(4). The Board's failure to consider this fact is further indication that it has embarked on a course of ignoring the specific intent of Congress as spelled out by the carefully drawn limitations to the proviso to Section 8(b)(4).

C. The Proviso to Section 8(b)(4) Protects Only Truthful Publicity; the Handbilling in the Instant Case Was Clearly False and Misleading.

For still another reason the Union's handbilling does not fall under the protection of the proviso to Section 8(b)(4). Those handbills, addressed "To the Patrons of this Store", stated that the Union urgently requests that patrons do not buy the following products distributed by Servette: Brach's Candy, Servette Candy, Good Season Salad Dressing and Old London Products.

These handbills go on to say that "the Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers." From a reading of this handbill one must reasonably infer and patrons are led to believe that a store that sold the above named products purchased those products through Servette, when in fact in a number of instances the market involved did not buy the products named from or through Servette but from and through another distributor that had nothing to do with the labor dispute between the Union and Servette, namely, Certified Grocers of Southern California [R. 55-56; 61-62; 65; 67-69]. Consequently, because the handbills are not truthful their distribution for that further reason is not protected by the proviso.

The Board concedes that not all of the markets purchased all of the four items listed from Servette (NLRB Brief, p. 27, n. 19). Thus it is evident that the handbills were untruthful at least to the extent that they were handed out in front of stores, which stores did not purchase the products from Servette as the handbills charged. The Board argues that the handbilling was "truthful" because all of the stores where the handbilling took place did business with Servette, purchased at least one of the listed items from Servette and that in fact Servette does distribute these items. The Board, however, is engaged in a mere play upon words. No matter what attempts the Board makes to conclude the handbilling was "truthful", it cannot avoid the logic and correctness of the following syllogism: Handbills must be truthful to be protected by the proviso; the Union's handbills reasonably and logically suggested to the public that all of these markets purchased

all these products from Servette; in this regard, the handbills were clearly untruthful.

The Board argues, however, based upon its rationale in *Lohman Sales Co., supra,* that the contents of the handbilling need not be 100 percent correct. However, here in this case where the public would easily and naturally be led to believe that all of these products named in the handbilling are distributed to these stores by Servette, the falsity is a most serious one. The person that is injured is an innocent party, Certified Grocers of Southern California. It is equally clear that Congress, to the very limited extent it permitted secondary boycott activities by the proviso to Section 8(b)(4), certainly sought to protect neutral parties, especially those having nothing whatsoever to do with the labor dispute. In such circumstances the departure from truth, having such a marked and detrimental effect upon innocent persons, is reason enough to exclude such activity from the proviso.

Conclusion.

For the foregoing reasons, the judgment and order of the court below should be affirmed.

Respectfully submitted,

HILL, FARRER & BURRILL,
By CARL M. GOULD,
STANLEY E. TOBIN,
Attorneys for Respondent.

Appendix.

The relevant provisions of the National Labor Relations Act, as amended in 1959 (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*), are as follows:

Sec. 2. When used in this Act—* * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

Sec. 8.* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise

dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up,

deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * * *

The relevant provisions of the National Labor Relations Act, as it existed prior to the 1959 Amendments (61 Stat. 136, 29 U. S. C. Sec. 151, *et seq.*), are as follows:

* * * * * *

Sec. 8.

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where the object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

Office-Supreme Court, U.S.
FILED
DEC 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 111

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SERVETTE, INC.,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply Brief for Servette, Inc., Respondent, to Brief of Amici Curiae, American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

HILL, FARRER & BURRILL,
CARL M. GOULD,
STANLEY E. TOBIN,
MALCOLM A. MISURACA,
411 West Fifth Street,
Los Angeles, California 90013,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Questions presented	1
Statement of the case	2
Summary of argument	2
Argument	5
I.	
The issues raised by amici are not properly before this court	5
II.	
Congress, in adopting Section 8(b)(4)(ii), clearly intended to prohibit secondary boycott activity that threatens, coerces, or restrains a neutral employer into ceasing business with a primary employer, and handbilling at the neutral employer's place of business, like picketing, has properly been considered within that prohibition	9
III.	
Section 8(b)(4)(ii) as applied in this case is constitutional	16
Conclusion	21

TABLE OF AUTHORITIES CITED

Cases	Page
Bakery Drivers Local v. Wohl, 315 U. S. 769	21
Brown v. American Federation of Television & R. Artists, 191 F. Supp. 676	20
Burr and Perfection Mattress & Spring Company v. NLRB, 321 F. 2d 612	12, 14
Business Service Employees v. Gassam, 339 U. S. 532	14
Eastern States Lumber Ass'n v. United States, 234 U. S. 600	14
Fruit and Vegetable Packers & Warehousemen v. NLRB, 308 F. 2d 311	13, 14
Giboney v. Empire Storage & Ice Co., 336 U. S. 490	3, 16, 21
Great Western Broadcasting Corporation v. NLRB, 310 F. 2d 591	8
Honeyman v. Hanan, 300 U. S. 14	7
IBEW v. N. L. R. B., 341 U. S. 694	16, 17, 18
Kitty Kelly Shoe Corp. v. Retail Employers, 125 N. J. Eq. 250, 5 A. 2d 682	14
Knetch v. United States, 364 U. S. 361	7
Local 662, Radio and Television Engineers (Middle South Broadcasting Co.), 133 NLRB 1698	9
Lohman Sales Company, 132 NLRB 901	9
Lorain Journal v. United States, 342 U. S. 143	14
Mason and Dixon Lines v. Odom, 193 Ga. 471, 18 S. E. 2d 841	14
NLRB v Hearst Publications, Inc., 322 U. S. 111	15
NLRB v. United Brotherhood, 184 F. 2d 60	16, 18

Page

Paramount Pictures v. United Motion Pictures T.O., 93 F. 2d 714 15

Parker v. County of Los Angeles, 338 U. S. 327 .. 7

Partenweederei, MS Belgrano v. Weigel, 313 F. 2d 423 6

Professional & Business Men's L. I. Co. v. Bankers Life Co., 163 F. Supp. 274 14

Rescue Army v. Municipal Court, 331 U. S. 549 ..6, 7

San Diego Bldg. Trades Council v. Garmon, 359 U. S. 236 15

Talley v. California, 362 U. S. 60 20

Teamsters Local 695 v. Vogt, 254 U. S. 284 14

Thomas v. Collins, 323 U. S. 516 21

United Brotherhood of Carpenters, etc. v. Sperry, 170 F. 2d 863, 341 U. S. 705 .....16, 17

United States v. Hayman, 342 U. S. 205 7

United States v. Singer Mfg. Co., 374 U. S. 174 ... 6

Valentine v. Christensen, 316 U. S. 52 20

Miscellaneous

105 Congressional Record 16591 10

105 Congressional Record 17328 11

105 Congressional Record 17898-17899 11

105 Congressional Record 19771 11

House Report 8400, Sec. 705(a) 10

I Legislative History, p. 681 10

Page

II Legislative History, p. 1378 11
II Legislative History, p. 1523 11
II Legislative History, p. 1708 10
II Legislative History, p. 1857 11

Rules

United States Supreme Court Rules, Rule 42, Sec. 1 7

Statutes

National Labor Relations Act, Sec. 8(b)(4) ..9, 11, 12
National Labor Relations Act, Sec. 8(b)(4)(ii) ....
..... 1, 3, 5, 9, 10, 13, 14, 15, 17
National Labor Relations Act, Sec. 8(c) 16
National Labor Relations Act, Sec. 10(e) 5, 6
29 United States Code, Sec. 158(c) 16

Textbooks

Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 274 11
Restatement of the Law of Torts, Sec. 779, comments (f)-(i) 14

IN THE

Supreme Court of the United States

October Term, 1963

No. 111

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SERVETTE, INC.,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply Brief for Servette, Inc., Respondent, to Brief of Amici Curiae, American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

Questions Presented.

1. Whether the additional issues raised by Amici Curiae are properly and timely raised to this Court and whether they conform to this Court's policy against unnecessary consideration of constitutional issues?

2. Whether the handbilling activity falls outside of the prohibition of Section 8(b)(4)(ii) of the Act?

3. Whether Section 8(b)(4)(ii) of the Act as applied in this case is constitutional?

Statement of the Case.

The Respondent's statement of the case is set forth at pages 2-5 of its Brief to this Court filed on October 26, 1963.

Thereafter on October 28, 1963, the motion of Amici for leave to file a brief was granted by this Court.

Summary of Argument.

A. Initially, the issues raised by Amici are not properly before this Court in that they were not raised in this case by either the Board or the Respondent or by any party before the Circuit Court of Appeals. In fact the court below stated that "the first intimation of such grounds in the instant case was raised on the motion for clarification" after that court handed down its decision. [R. 105.] This Court has repeatedly indicated that it would not entertain questions that have not been litigated in the courts below. Further, this Court has also indicated that Amici Curiae should not be allowed to inject new issues into a case.

The Court has also repeatedly held that it will not for the convenience of the parties anticipate constitutional issues, even where they might otherwise have been properly raised. The issues that Amici seek to raise in this case are presently before the Board for consideration and Amici are improperly attempting to anticipate those issues, thus circumventing their consideration both by the Board and the court below.

B. Amici disagree with both the Board and Respondent that the handbilling activity in this case was violative of Section 8(b)(4)(ii). The legislative history of that section makes it clear that Congress regarded handbilling like picketing as coercive when used in a secondary boycott against neutral employers, and that, except for the narrow and limited proviso to that section, Congress meant to prohibit such secondary activity. The Board, in taking the position that the union's handbilling activity constituted coercion, properly interpreted the meaning of Section 8(b)(4)(ii). The facts in this case further show that the handbilling did, in fact, bring about the coercion prohibited by the Act.

C. This court has repeatedly indicated that the first amendment does not protect speech that, when joined with a course of conduct, is aimed at some unlawful end. *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1946). Amici continually confuse the prohibition against "threat, coercion or restraint" as set forth in Section 8(b)(4)(ii). The test is not coercion of the consumer, but that of the neutral employer. And here the record is clear that the union primarily intended to coerce neutral employers and was successful in so doing. Whatever effect handbilling may have on the public says nothing of its effect on the employer. Employers were in fact coerced into diminishing or ceasing their business with the Respondent, even if consumer response itself may have been uncoerced.

Amici are further in error in treating picketing and handbilling as if at the opposite ends of some constitutional spectrum. Where, as here, the handbilling is done at the *locus in quo* of neutral employers for an object forbidden by Congress, and is, therefore, no less prohibitive than picketing, such activity is not constitutionally protected. The union conducted no mere "informational exercise." Its admitted aim was to promote a boycott by dealers and consumers of Servette products. In so doing both its means and its objective were unlawful and therefore such activity is not constitutionally protected.

ARGUMENT.

I.

The Issues Raised by Amici Are Not Properly Before This Court.

Respondent has heretofore objected to consideration by the Court of those issues that Amici Curiae seek improperly to inject into this case. [Objection to Brief Amici.] Respondent repeats herein, in part, its prior arguments in support of its objection, in the event the Court has not thus far reached them on the merits.

The sole issue before this Court with respect to Section 8(b)(4)(ii) of the National Labor Relations Act is whether a boycott by a union of neutral parties is exempted from violating the Act by virtue of the second proviso to that section. Amici Curiae seek to raise two additional questions, to which Respondent objects on the following grounds:

1. Neither question is timely raised to the Court in accordance with its long-standing rule that issues shall come to the Court only after they are orderly adjudicated in the courts below.

The court of appeals in this case ruled in response to a motion for clarification filed by the National Labor Relations Board that these issues were not properly before the court. They were raised neither by the Board in its opinion nor by either party to the court of appeals in briefs or argument. The court stated that "the first intimation of such grounds in the instant case was raised on the motion for clarification." [R. 105; 313 F. 2d 66, 67.] Amici Curiae are incorrect in suggesting that the court refused to consider these questions solely on the ground of Section 10(e) of the

Act. Before noting the applicability of that section, the court relied on its holding in *Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423 (9th Cir. 1962), in which the court ruled:

> It is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal, nor, a fortiori, as herein, in a petition for rehearing on appeal. This requirement sets the scope of the lawsuit, thereby preventing piecemeal litigation and consequent waste of the time of both trial and appellate courts. It assures that the opposing party will know the claims he must meet. It gives the appellate court the benefit of the district court's wisdom, and it prevents a litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below.

(313 F. 2d 423, 425.) Clearly, Amici are in error in asserting that the court below primarily grounded its refusal to consider these questions on Section 10(e) of the Act. That court quite properly held that the failure to present these issues prior to the motion for clarification precluded their consideration. Manifestly, then, even greater reasons argue against this Court's entertaining these questions now.

See also,

Rescue Army v. Municipal Court, 331 U. S. 549 (1947);

United States v. Singer Mfg. Co., 374 U. S. 174, 175 n. 1 (1963).

2. Amici Curiae should not be allowed to inject into this case issues not raised by the parties.

Amici Curiae concede that neither the National Labor Relations Board nor the Respondent has raised to the Court the issues that Amici seek to raise. (Motion for Leave to File a Brief Amici Curiae, p. 5, par. 4.) Briefs Amici Curiae are not favored by the Court (United States Supreme Court Rules, Rule 42, Section 1); and in any event Amici Curiae should not be allowed to inject new issues into this case. *Knetch v. United States*, 364 U.S. 361, 370 (1960).

3. The asserted constitutional question is premature and not timely raised, and thus does not conform to this Court's policy against unnecessary consideration of constitutional issues.

The question whether a boycott is illegal does not raise a first amendment issue. If it did, every case involving the construction of a statute prohibiting boycotts—the Sherman Act, for example—would present a free speech issue. This Court has repeatedly held that it will not for the convenience of the parties anticipate constitutional issues even where they might otherwise have been properly raised. *United States v. Hayman*, 342 U. S. 205 (1952); *Parker v. County of Los Angeles*, 338 U. S. 327 (1949); *Honeyman v. Hanan*, 300 U. S. 14 (1937). This Court analyzed its policy in *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947), when it stated, at page 570:

> Moreover the policy is neither merely procedural nor in its essence dependent for applicability upon the diversities of jurisdiction and procedure, whether of the state courts; the inferior federal courts, or this Court. Rather it is one of substance, grounded in considerations which transcend all

such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure.

(4) The very questions raised by Amici Curiae are before the National Labor Relations Board in another action and await decision in the orderly process of judicial administration.

Amici Curiae are parties to NLRB Case No. 20-CC-234, which is presently before the National Labor Relations Board upon remand by the Court of Appeals for the Ninth Circuit to the Board for its consideration of the issues raised by Amici Curiae. *Great Western Broadcasting Corporation v. NLRB*, 310 F. 2d 591 (9th Cir. 1962).

Amici Curiae not only attempt to anticipate those issues here, but to circumvent their consideration by the National Labor Relations Board and the Ninth Circuit Court of Appeals in the *Great Western Broadcasting* case. The presentation of those issues would be untimely and would prevent the Court from having the wisdom and judgment of the lower courts. In *Great Western Broadcasting*, the lower courts would be deprived of their usual function, to hear and judge these issues in the orderly course of judicial administration.

II.

Congress, in Adopting Section 8(b)(4)(ii), Clearly Intended to Prohibit Secondary Boycott Activity That Threatens, Coerces, or Restrains a Neutral Employer Into Ceasing Business With a Primary Employer, and Handbilling at the Neutral Employer's Place of Business, Like Picketing, Has Properly Been Considered Within That Prohibition.

Aside from the different interpretation each gives to the second proviso to Section 8(b)(4), the Board and Respondent are in agreement that "Distributing handbills outside a retail store requesting potential customers not to purchase the goods of a particular supplier, like Servette, would be an unfair labor practice under Section 8(b)(4)(ii), because the union would be coercing or restraining the retailer with the object of forcing it to cease dealing in the products of the supplier. . . ." (Board's Pet. for Cert. p. 12)[1]

The legislative history of Section 8(b)(4)(ii) shows that Congress, in considering (ii)'s intended scope, had the question of handbilling before it and carefully refused to exempt handbilling from the sec-

---

[1] In addition, the Board based its ruling below on *Lohman Sales Company*, 132 NLRB 901, 904 (1961), where it stated that handbilling "might constitute restraint and coercion" but for the proviso. And in *Local 662, Radio and Television Engineers' (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705 (1961), the Board stated, "We also agree with [the trial examiner's] finding that, unless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on [the struck radio station] would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) in violation of that Section."

tion except to the extent covered by the very narrow exclusion in the second proviso.

The Landrum-Griffin bill, introduced in the House, contained the provision presently before the Court.[2] After passing the House with the (ii) provision, the bill went to the Conference Committee together with its Senate counterpart, the Kennedy-Ervin bill. Senator Kennedy and Congressman Thompson prepared an analysis of the Landrum-Griffin bill and objected to Section 8(b)(4)(ii) because of its ban, not only on consumer picketing of a secondary employer's premises, but also on other forms of consumer appeals, such as handbilling. They noted:[3]

> The House bill provides that a union may not "restrain" or "coerce" an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
>
> Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors Beer during the strike. It can picket the bars and restaurants which sell Coors Beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.

---

[2]Section 705(a) of H. R. 8400, I Leg. Hist. 681.
[3]105 Cong. Rec. 16591, II Leg. Hist. 1708.

The House bill outlaws such appeals to the general public for assistance in winning fair labor standards.

The Conference Committee adopted the Landrum-Griffin provision over these objections, but added a separate proviso to limit its ban on consumer appeals. The proviso exempted from the section certain forms of publicity other than picketing in "narrow and limited" situations not presented here.[4] Otherwise, Congress demonstrated by having the Kennedy-Thompson objections placed squarely before it that handbilling was very much in its mind; that it regarded handbilling, like picketing, as coercive when used in a secondary boycott; and that—except for the proviso—it meant to prohibit its use in these situations.[5] The legislative history clearly demonstrates that the Senate yielded and agreed to the House position on this point.[6]

It is also clear that Congress intended to prohibit secondary picketing and handbilling at the premises of the neutral employer, when for the unlawful purposes set forth in Section 8(b)(4), without any initial show-

---

[4]105 Cong. Rec. 19771, II Leg. Hist. 1857; 105 Cong. Rec. 17898—17899, II Leg. Hist. 1432. See also remarks of Congressman Griffin, who stated:

> The courts also have held that, while a union may not induce employees of a secondary employer to strike for one of the forbidden objects, *they may threaten the secondary employer*, himself, *with* a strike *or other economic retaliation* in order to force him to cease doing business with a primary employer with whom the union has a dispute. *This bill makes such coercion unlawful* by the insertion of a clause 4(ii) forbidding threats or coercion against "any person engaged in commerce or an industry affecting commerce." II Leg. Hist. 1523.

[5]See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 274 (1959).

[6]105 Cong. Rec. 17328, II Leg. Hist. 1378.

ing that the union's activity caused actual injury to the neutral employer. *Burr and Perfection Mattress & Spring Company v. NLRB*, 321 F.2d 612 (5th Cir. 1963).[7] Pointing out that such a strained interpretation of Section 8(b)(4) deprives subsection (ii) of any real utility, that court stated (at 620-621):

> The fallacy of the approach of the *Fruit & Vegetable* case is demonstrated by the fact that its standard effectually deprives §(ii) of any real utility. The thesis of that decision is that the adverse economic effect of the consumer picket line must be demonstrated affirmatively as a fact. That means that to obtain the protection afforded by Congress against the *threat* of injury, a party must first be injured. And if it is actual injury, what is to be the test of injury? If, for example, under the union's threat of posting a consumer picket line, a secondary retailer knuckles under as some did in *Servette, Inc.* * * * what must that retailer show? Must he prove not only that he lost the opportunity of making the average number of sales of that product, but also that this was not offset by substituted products of competitor suppliers? Must the retailer demonstrate by identified customers that some refused to (a) purchase the picketed product or (b) patronize him at all? These and many other questions which would inhere in every secondary consumer picketing dem-

[7] Amici argue that "[handbilling] may or may not result in persuading a sufficient number of consumers to take a stand that will bring about a diminution of profits by non-union business." (Amici Brief, p. 16.) But actual economic loss to the employer is not the issue, since there is no Congressional mandate that the employer lose profits, but only that he be coerced, which may well come before or even without a loss of sales and profit.

> onstrate convincingly why Congress could not have intended that an Amendment designed to close a major and serious loophole would be stripped of all practical utility either by requiring that threatened damage be actually sustained, or that one feeling the pinch furnish specific answers to metaphysical inquiries as to the harm suffered. [Footnote omitted.]

Even the court in *Fruit and Vegetable Packers & Warehousemen v. NLRB*, 308 F.2d 311 (D.C. Cir. 1962) pointedly did not distinguish between picketing, on the one hand, and the type of handbilling involved here on the other. The court of appeals in that case stated (at 315):

> Looking solely to the language of the statute, however, we believe the most plausible reading to be that §8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation "publicity other than picketing" even though it threatens, coerces or restrains an employer. For example, handbilling which has a severe economic impact on the secondary employer's business might be "coercive" *but it would be exempted from regulation by the proviso.* (Emphasis added.)

While both the Board and Respondent disagree with the basic position set forth by the court of appeals in *Tree Fruits*, that court in turn disagrees with the still different interpretation given to the statute by Amici, and expressly recognizes that Section 8(b)(4)(ii) undoubtedly covers both picketing and handbilling. Only the proviso, to the extent applicable, makes such

a distinction. Amici's efforts to remove handbilling from the statute altogether (Amici Brief, p. 23, *et seq.*) not only would make the proviso itself meaningless, but receive no support from the legislative history of Section 8(b)(4)(ii) or the cases that have thus far examined the statute.

In reality, no meaningful or logical distinction can be found between picketing and handbilling at the premises of the neutral employer, for as the Board and the courts in the *Burr* and *Tree Fruit* cases recognize, Congress intended to make unlawful secondary boycott activities that "threaten, coerce or restrain" neutral persons; and in this context handbilling at the *locus in quo* wears all the vestments of picketing. There is in fact considerable authority holding that "picketing" includes handbilling at the *locus in quo*.[8]

It has, moreover, been recognized since *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600, 614 (1914), that even the peaceful circulation of a blacklist constitutes coercion, for in that case the Court held that certain retailers violated the antitrust laws "by placing obnoxious wholesale dealers under the *coercive* influence of a condemnatory report circulated among others."[9] Particularly in point is *Paramount Pictures*

---

[8]See Restatement of Torts, Sec. 779, Comments f through i; *Kitty Kelly Shoe Corp. v. Retail Employers*, 125 N. J. Eq. 250, 5 A. 2d 682, 684 (1939); *Mason and Dixon Lines v. Odom*, 193 Ga. 471, 18 S. E. 2d 841, 844 (1942). *Cf. Teamsters Local 695 v. Vogt*, 254 U. S. 284, 289 (1957); *Business Service Employees v. Gassam*, 339 U. S. 532, 537 (1950).

[9](234 U. S. 614). Similarly, in *Lorain Journal v. United States*, 342 U. S. 143 (1951), the Court held that an attempt by a newspaper publisher to force its advertisers to boycott a radio station constituted an unlawful restraint (see 342 U. S. 152-155, particularly p. 154, n. 8). Also, in *Professional & Business Men's L. I. Co. v. Bankers Life Co.*, 163 F. Supp. 274,

v. United Motion Pictures T.O., 93 F. 2d 714 (3rd Cir. 1937), in which a number of theater owners threatened to ask the public by pamphlets, letters, and other publicity not to patronize theaters playing Paramount Pictures. There was no showing of violence, and defendants disclaimed any threat to picket the theaters (93 F. 2d 718), but the court held that their conduct was nonetheless coercion (93 F. 2d 720).

Finally, the Board's determination that the Union's handbilling activity constituted coercion *per se* within the meaning of Section 8(b)(4)(ii) should be given deference and weight by this Court. As this Court has said, "Congress has entrusted the administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures and equipped with its specialized knowledge and cumulative experience." *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236, 242 (1959); *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 130, 131 (1944). The Board's determination, based upon its expertise, is supported not only by the legislative history of the Act and the leading cases that have interpreted it, but by all the evidence in this case.[10]

281-283. (D. Mont. 1958), the court held illegal a boycott accomplished by newspaper advertisements and leaflets, which induced members of the public to refrain from patronizing plaintiff.

[10]Of course, the record clearly shows that there was coercion in fact. The record shows that in some instances the union threatened employers and store managers that the union would pass out handbills and on many other occasions did carry through its threat. [R. 55-67.] At times the threat alone had the effect of causing the employer to cease doing business with Servette and causing store managers to refuse to perform services for their employers. [R. 63-64.] At other times the stores ceased doing business with Servette only after the handbilling had commenced. [R. 59-61.]

III.

Section 8(b)(4)(ii) as Applied in This Case Is Constitutional.

Even before this Court handed down *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1946), it was clear that the first amendment does not protect speech that, when joined with a course of conduct, is aimed at some unlawful end. This Court said in *Giboney* (336 U. S. at 502):

> [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed.

In that case a state statute prohibited the coercion of a neutral party into refusing to deal with the parties to a labor dispute. The Court expressly rejected the union's assertions that, notwithstanding the statutory prohibition, it had a constitutional right to publicize the facts of the dispute and that such publicity could be separated from other coercive acts. (336 U. S. 498, 502).

This Court upheld that same principle in *IBEW v. N. L. R. B.*, 341 U. S. 694 (1951). There the Court took the position that the prohibition of a secondary boycott by picketing and a telephone call "carries no unconstitutional abridgement of free speech." (341 U. S. 705).[11] In support of its conclusion this Court cited and approved *NLRB v. United Brotherhood*, ... F.2d 60, 62 (10th Cir. 1950), and *United Brotherhood of Carpenters, etc. v. Sperry*, 170 F.2d 863, 868-

[11]The Court in *Electrical Workers* also held (341 U. S. 700-701) that the prohibition of a secondary boycott was not inconsistent with section 8(c) of the Act (29 U. S. C. 158(c)).

869 (10th Cir. 1948); (see 341 U. S. 705 n. 9). Both cases upheld a prohibition of the circulation of a blacklist.

> *The promulgation and circulation of a blacklist* and the picketing of premises as the means of waging a secondary boycott which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment or section 8(c) of the act. Concretely, neither the constitutional nor statutory provision protected appellants *in their* blacklisting of [the neutral] Klassen and their picketing of its premises as a means of waging a secondary boycott against that company, with substantially harmful effect upon interstate commerce. (Emphasis added.)[12]

Congress enacted Section 8(b)(4)(ii) to reach precisely what that section states: any threat, coercion, or restraint of any person for the purpose of forcing or requiring him to cease doing business with any other person. Congress drew no distinction between action that threatens or coerces and words that do the same. Coercion was forbidden, no matter what the means used to achieve it.

The Board, Respondent, and now Amici agree that the union's handbilling sought to "demonstrate to the store owner that continued handling of Servette goods during the strike was not profitable." (Amici Brief, p. 15.) The union itself regarded the handbilling as part of its campaign "to enlist the aid and cooperation of retail markets handling and stocking the products

[12] *United Brotherhood of Carpenters, etc. v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948). In the *Electrical Workers* case (341 U. S. at 701 n. 6) the Court also quoted a similar passage.

distributed by Servette in the [union's] strike against Servette and to promote a boycott by dealers and consumers of those products." [R. 75.]

Finally, the record itself is replete with evidence of the union's success with its handbilling activity and indicates that more than once such activity effectively coerced neutral employers. The prime object of the union was therefore attained. Purchases from Servette by neutral employers thereupon either diminished or stopped completely. [R. 59-61; 63-64.]

Amici acknowledge the union's intent to force store owners to cease purchasing Servette products and furthermore admit the coercive effect of the union's efforts. They, nonetheless, still contend that the handbilling here is constitutionally protected because it was ostensibly directed to the consumer, whose response is allegedly purely uncoerced and spontaneous. Amici confuse coercion of the consumer—not the test here—with the prohibited coercion of neutral employers. Initially, it must be stressed that in some instances the union threatened the store managers *directly*, at times before and at times even without actually handbilling the public. Clearly such threats and coercion, patently violative of the provision of Section (ii), cannot be immunized by the otherwise tenuous argument that the coercion was only "indirect" and therefore constitutionally protected.

Amici moreover attempt to evade the validity of restricting coercion upon neutral employers by so-called indirect methods. First, Amici argue that, unlike picketing, handbilling carries no "signal" to action on the

---

from the subsequent opinion (*NLRB v. United Brotherhood*, 184 F. 2d 60, 62 (10 Cir. 1950)) and noted that it was denying certiorari in the latter case (341 U. S. 947) because of its decision in *Electrical Workers*.

part of the undisciplined public and does not coerce the consumer, because the only power of handbills is "the persuasive power of the words themselves." (Amici Brief, p. 12.) Such a proposition is naive on its face. A handbill bearing the word "unfair" would be no less persuasive and probably no less effective against the neutral employer than the same word on a picket.

The issue here is not whether the *public* is coerced, but whether the neutral *employer* is coerced; and unless Amici argue that only by coercing the public can the union coerce the employer, their argument reaches no conclusion of any assistance to the Court. Whatever effect handbilling may have on the public says nothing of its effect on the employer, which is amply proved here, since employers were in fact coerced into diminishing or ceasing business with Servette, even if consumer response itself may have been uncoerced. The impact of words alone, imprinted on a handbill, can coerce the employer who sees the handbill distributed when he realizes that his economic success is intimately involved with each consumer's "sympathetic response." And if the consumer is in fact persuaded and ceases to buy Servette products, coercion is even made more manifest.

In any event, Amici's error lies in treating picketing and handbilling as at the opposite ends of some constitutional spectrum, with picketing being coercive and therefore validly restricted, handbilling being simply persuasive and therefore protected at any cost.[13] But even if picketing has some special significance to union members, handbilling may still have *its* effect and *its* coercive significance. Both handbilling and picketing

[13] See Footnote 8, *supra*.

can be done at the *locus in quo*, each with an object forbidden by Congress, *i.e.*, each in an attempt to use third parties to coerce the neutral employer.

The conduct at issue here was certainly far more than simple speech,[14] for the union set out with the avowed purpose of forcing neutral employers into boycotting Servette and not only handbilled consumers at the employers' premises but also approached the store managers and threatened to handbill or continue to handbill unless and until they "knuckled under" and stopped doing business with Servette.[15] [R. 55-67.] The handbilling, coupled with the threats, under these circumstances loses even the alleged constitutional protection urged by Amici.[16]

---

[14] *Talley v. California*, 362 U. S. 60 (1960), and other cases not involving restriction of speech when directed to an unlawful objective, are not relevant here.

[15] A clearly relevant inquiry is whether the Union handbilling here has not passed into the type of "commercial speech" that this Court has held has no first amendment protection. *Valentine v. Christensen*, 316 U. S. 52 (1942); see also the holding in *Thomas v. Collins*, *infra*, that whether speech is "commercial" turns on the facts of each case. 323 U. S. at 531.

[16] The threats themselves are violative of the statute and not constitutionally protected even assuming that the handbilling is constitutionally protected. As the court in *Brown v. American Federation of Television & R. Artists*, 191 F. Supp. 676, 679 (N. D. Cal. 1961) stated in virtually the same circumstances:

> In all events, even if respondents *were* entitled to publicize the facts by circulating such a leaflet, they were *not* entitled to threaten KXTV's advertisers, engaged in commerce, with such action, in order to force or require them to cease doing business with KXTV. It is *not* true that one may threaten to do whatever he may do. One may not threaten to take lawful action, where the purpose of the threat is illicit. Thus, a magazine editor may lawfully publish the truthful facts concerning unsavory incidents in the life of a person who is prominent in the public eye, such as a movie star or politician; but the magazine editor may not lawfully threaten to publish such facts unless the person concerned pays blackmail to the editor.

This Court in *Thomas v. Collins*, 323 U. S. 516, 537-538 (1945)—and again in *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 503 n. 6 (1949)—said when referring to the right to limit coercive use of speech:

> When to this persuasion other things are added *which bring about coercion, or give it that character*, the limit of the right has been passed. *Cf. Labor Board v. Virginia Electric & Power Co., supra* [314 U. S. 469, 477-478]. But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. (Emphasis added.)[17]

The union conducted no mere "informational exercise" and might well have considered public response irrelevant, inasmuch as when individual employers once were coerced the union apparently no longer felt the urge to handbill.

Conclusion.

For the foregoing reasons the judgment and order of the court below should be affirmed and the arguments raised by Amici should be rejected.

Respectfully submitted,

HIEL, FARRER & BURRILL,
CARL M. GOULD,
STANLEY E. TOBIN,
MALCOLM A. MISURACA,
Attorneys for Respondent.

[17] In *Bakery Drivers Local v. Wohl*, 315 U. S. 769, 775 (1942) this Court reversed the state court because the latter failed to find "that the publication was attended or likely to be attended by violence, force, or *coercion, or conduct otherwise unlawful or oppressive*." (Emphasis added.)